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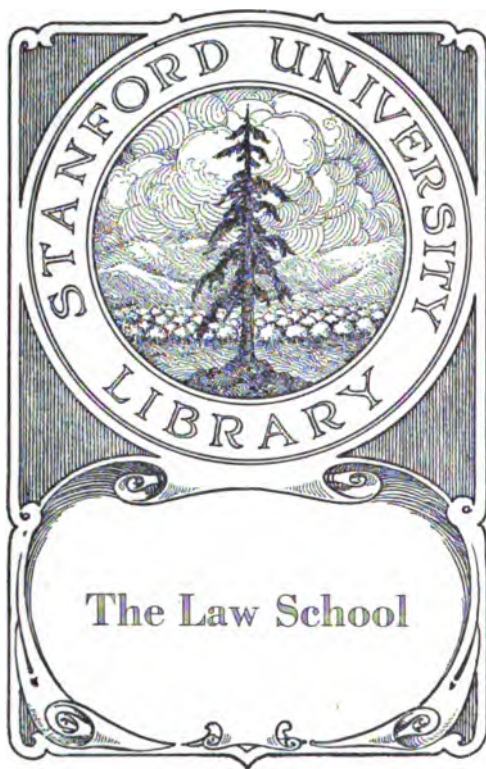
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OFFICIAL OPINIONS
OF
THE ATTORNEYS GENERAL
THE UNITED STATES
ADVISING THE
PRESIDENT AND HEADS OF DEPARTMENTS
IN RELATION TO
THEIR OFFICIAL DUTIES

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HON. T. W. GREGORY,
Of Texas.

HON. A. MITCHELL PALMER,
Of Pennsylvania.

HON. GEORGE W. WICKERSHAM,¹
Of New York.

ALSO CONTAINING OPINIONS BY SOLICITORS GENERAL

HON. JOHN W. DAVIS, of West Virginia

HON. ALEX. C. KING, of Georgia

AND

Acting Attorney General

G. CARROLL TODD.

**ALSO CONTAINING CITATIONS OF ACTS OF CONGRESS,
THE REVISED STATUTES, THE CONSTITUTION, TREA-
TIES AND CONVENTIONS, OPINIONS OF THE ATTOR-
NEYS GENERAL, AN INDEX TO SUBJECTS, AND AN
INDEX DIGEST.**

¹ Several opinions rendered by Mr. Wickersham, and temporarily withheld from publication, appear in this volume.

Indices and Tables of Citations
prepared by
EMILY A. SPILMAN.

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OPINIONS
OF
HON. THOMAS WATT GREGORY, OF TEXAS.

APPOINTED AUGUST 29, 1914.

DRAWBACK ON CIGARETTES SENT ABROAD FOR DESTRUCTION.

A drawback is not allowable under paragraph O, section 4, of the tariff act of October 3, 1913 (38 Stat. 200), on cigarettes manufactured in the United States from imported Turkish tobacco for domestic trade, and which have been recalled from domestic trade, after having become deteriorated or unsalable, and then shipped abroad, not for use in the commerce of any foreign country, but for the purpose of destruction.

The sending of goods out of this country merely for the purpose of destruction does not constitute an "exportation" within the intent of the drawback provision of the statute in question.

DEPARTMENT OF JUSTICE,
October 24, 1916.

SIR: I have the honor to acknowledge receipt of your letter of August 28, 1915, supplemented by letters of October 5 and December 15, 1915, transmitting additional information, in which you request my opinion with relation to the payment of drawback on certain cigarettes under paragraph O, section 4, of the tariff act of October 3, 1913. The facts as stated by you appear to be as follows:

Domestic manufacturers of cigarettes of various brands from imported Turkish tobacco are accustomed to recall from their domestic trade quantities of cigarettes which have become deteriorated, or unsalable from other causes, ship them to the free port of Singapore, where they are de-

NOTE.—Several delayed opinions, which were temporarily withheld from publication, appear in this volume beginning at p. 545.

stroyed by fire, and landing certificates properly executed and returned to the exporters by the Singapore consignee (who is paid 57 cents a case for the service). Demand is then made for the payment of the drawback of 99 per cent of the duties paid upon the imported tobacco incorporated in such cigarettes.

The claimants here are confronted with these conditions:

(1) *The particular cigarettes involved have been sold under an absolute, unconditional sale in the domestic markets, repurchased and exported after becoming deteriorated and unsalable;*

(2) *They have not been manufactured for export, and no intent to export them ever came into existence until they became unsalable;*

(3) *They were not exported for use in, or with any intention of having them enter into, the commerce of any foreign country.*

You ask whether under the conditions stated drawbacks should be paid. I am of opinion that the claimants are not entitled to drawbacks.

The pertinent portion of paragraph O, section 4, of the tariff act of October 3, 1913 (38 Stat., 200), under which the demand for the payment of drawback is made, provides:

"That upon the exportation of articles manufactured or produced in the United States by the use of imported merchandise or materials upon which customs duties have been paid, the full amount of such duties paid upon the quantity of materials used in the manufacture or production of the exported product shall be refunded as drawback, less 1 per centum of such duties."

Drawback legislation in this country may be divided, generally, into three periods.

1. The first tariff act of July 4, 1789 (1 Stat. 26, 27), allowed drawbacks upon imported goods when exported within 12 months. This general system, which permitted the payment of drawbacks only upon goods exported in their original form and packages, was continued in force, with a few sporadic exceptions, in the numerous succeeding tariff acts up to August 5, 1861. This system is

not now in force; but is virtually continued in effect by the bond and warehouse system.

2. The tariff act of August 5, 1861 (12 Stat. 292), added to the previously existing system a provision for the payment of drawbacks upon exported articles of domestic manufacture, composed *wholly* of imported material. This general system continued in force, with a few minor exceptions, until the passage of the act of October 1, 1890 (26 Stat. 617).

3. The act of October 1, 1890, for the first time, provided for the payment of drawbacks generally upon imported materials contained in articles of domestic manufacture, regardless of the quantities of such materials used, upon exportation. This system is still in force, identical words having been incorporated in the successive tariff acts of August 27, 1894 (28 Stat. 551), of July 24, 1897 (30 Stat. 151), and August 5, 1909 (36 Stat. 90). The existing law here under consideration is in substantially similar form and of identical import.

The legislative history and a review of statutes allowing drawbacks upon imported materials used in domestic manufactures materially aids in arriving at the meaning of the words "export" and "exportation," as there employed.

The first statute on the subject (act of March 3, 1791, sec. 51, 1 Stat. 210) contained introductory words (inserted in the body of the act, but as a preamble to the specific drawback section) explicitly stating that it was for the purpose of encouraging the export trade of the United States, as follows:

"And for the encouragement of the export trade of the United States:

"SEC. 51. *Be it further enacted*, That if any of the said spirits (whereupon any of the duties imposed by this act shall have been paid or secured to be paid) shall, after the last day of June next, be *exported* from the United States to any foreign port or place, there shall be an allowance to the exporter or exporters thereof, *by way of drawback*, equal to the duties thereupon, according to the rates in each case by this act imposed, deducting therefrom half a cent per gallon, and adding to the allowance upon spirits

distilled within the United States, from molasses, which shall be *so exported, three cents per gallon, as an equivalent for the duty laid upon molasses* by the said act making further provision for the payment of the debts of the United States."

Section 25 of the act of October 1, 1890 (26 Stat. 617), provided:

"That where imported materials on which duties have been paid, are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed *on the exportation* of such articles a drawback equal in amount to the duties paid on the *materials used*, less one per centum of such duties."

The purpose and intent of this provision of the act of October 1, 1890—the genesis of the present drawback system—are thoroughly developed in the remarks of Mr. McKinley, the chairman of the committee which drafted the bill, in opening the debate upon it in the House of Representatives. He disclosed the purpose of the statute as follows (Cong. Rec., May 7, 1890, v. 21, pt. 5, pp. 4247-4248):

"By way of encouraging exportation to other countries and extending our markets, the committee have liberalized the drawbacks given upon articles or products imported from abroad and *used in manufactures here for the export trade*. Existing law refunds 90 per cent of the duties collected upon foreign materials made into the finished product at home and exported abroad, while the proposed bill will refund 99 per cent of said duties, giving to our citizens engaged in this business 9 per cent additional encouragement, the Government only retaining 1 per cent for the expense of handling.

"We have also extended the drawback provision to apply to all articles imported which may be finished *here for use in the foreign market*. Heretofore this privilege was limited. This, it is believed, will effectually dispose of the argument so often made that our tariff on raw materials, so called, confines our own producers to their own market and *prevents them from entering the foreign mar-*

ket, and will furnish every opportunity to those of our citizens desiring it *to engage in the foreign trade.*

"Now, the bill proposes that the American citizen may import any product he desires, manufacture it into the finished article, using in part, if necessary, in such manufacture domestic materials, and when the completed product is entered for export refunds to him within 1 per cent of all the duty he paid upon his imported materials.

"That is, we give to the capital and labor of this country substantially free trade in all foreign materials *for use in the markets of the world* * * *.

"We have extended this provision and in every way possible liberalized it, so that the domestic and foreign product can be combined and still allow to the exporter 99 per cent upon the duty he pays upon his foreign material intended for export; which is, in effect, what free traders and our political opponents are clamoring for, namely, free raw material *for the foreign trade.* And if you are desirous of seeing what you can do *in the way of entering the foreign market*, here is the opportunity for you.

* * *

"It completely, if the provisions be adopted, disposes of what has sometimes seemed to be an almost unanswerable argument that has been presented by our friends on the other side, that if we only had free raw material we could go out *and capture the markets of the world.* We give them now within 1 per cent of free raw material, and invite them *to go out and capture the markets of the world.*

"Mr. SPRINGER. Will the gentleman permit me to ask if that also applies to wool?

"Mr. MCKINLEY. Yes; it applies to anything in which they choose to import for purposes of manufacture. If my friend wants to engage in the manufacture of cloth and he wants free wool, he can get within 1 per cent of his free wool and engage in the manufacture under this provision of the law, *and the entire export trade is open to him if he thinks the foreign market better than the home market.*"

While the drawback features of the existing law are intended to encourage domestic manufactures, this encouragement is intended only when such manufactures are endeavoring to build up the foreign trade of the United States. The two purposes are joint and inseparable. No other construction will reconcile the principles of the customs system and of drawback allowances.

In the course of our fiscal policy, domestic manufactures for domestic commerce and consumption have frequently been encouraged by customs duties upon like imported articles. The two systems (customs duties and drawback allowances), while both have the common purpose of building up domestic manufactures, are clearly distinguishable in all other features. The one, in addition to providing revenues, is intended to promote domestic manufactures primarily for home consumption. The other, likewise intended to encourage domestic manufactures, clearly contemplates—indeed, its chief purpose is—the building up of our foreign commerce. But it does not contemplate, and it was never intended that our foreign commerce should be promoted at the cost of the American consumer, or by discrimination against the American manufacturer using only domestic materials.

If the manufacturer using imported materials, who sells both at home and abroad (as in this case) may through a colorable export recover drawbacks upon imported materials contained in the finished articles sold to his domestic retail trade, which have become spoiled and unsalable in the hands of that trade, he receives a reduction of the duty paid upon such materials in the exact ratio which the drawback allowance, less incidental expenses, bears to the amount of the duty paid. Drawback allowances under the conditions set forth in the case under consideration not only contravene the purpose and spirit of their creation, but indirectly reduce the duties fixed by Congress, and are opposed to one of the chief purposes for which they are fixed.

The purpose of drawback allowance has been made plain by the courts and in executive opinions.

United States v. Passavant (1897), 169 U. S., 16, 23:

"It (bonification of a domestic tax upon export) is a special advantage extended by government in aid of manufactures and trade, having the same effect as a bonus or drawback. To use one of the definitions of drawback, it is 'a device resorted to for enabling a commodity affected by taxes to be exported and *sold* in the foreign market on the same terms as if it had not been taxed at all.'"

Tidewater Oil Co. v. United States (1897), 171 U. S. 210, 216:

"The object of the (drawback) section was evidently not only *to build up an export trade*, but to encourage manufactures in this country, *where such manufactures are intended for exportation*, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer *to compete in foreign markets with the same articles manufactured in other countries*. In determining whether the articles in question were wholly manufactured in the United States, *this object should be borne steadily in mind.*"

Swan & Finch Co. v. United States (1903), 190 U. S. 143, discussing a claim to drawback allowances (pp. 144, 145):

"Whatever primary meaning may be indicated by its derivation, the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country. 'As the legal notion of emigrating is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to this country *with an intention of uniting them to the mass of things belonging to some foreign country or other.*' 17 Op. Attys. Gen. 583."

Kennedy et al v. United States (1899—C. C. A., 2d Cir.), 95 Fed. 127, again referring to a drawback statute (p. 129):

"The next question is whether jute bags 'leased' to a steamship company for the transportation of grain are exported within the meaning of section 3019. *The export-*

tation to which the statute refers is an exportation to a foreign country for use in such country or for sale."

The Anheuser-Busch Brewing Co. v. United States (1906), 41 Ct. of Cls. 389, 399, 400. (Af. 1908—207 U. S. 556):

"The object of the drawback law was *to build up an export trade and encourage manufactures in this country, where such manufactures are intended for exportation*, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to *compete in foreign markets* with the same articles manufactured in other countries."

Opinion of Solicitor General Taft, September 1, 1890 (19 Op. 638, 640):

"The manifest purpose of Congress was to foster the manufactures of this country by giving to the domestic manufacturer, *in his competition in foreign markets*, the benefit of free imported materials, and at the same time to prevent competition with such materials in the home market. To allow materials in the first instance to come in free of duty for this purpose would have required cumbersome and expensive Government inspection to prevent fraud. A drawback equal in amount to the original duty and payable at the time of export was, therefore, provided to operate as an inducement to this manufacture *for foreign markets.*"

Attorney General Knox in his opinion of February 14, 1902, (23 Op. 626), discussing whether an automobile converted into an express wagon in this country was entitled to drawback upon export, he said:

"It is evident, then, that under this law and under later analogous drawback laws, *the joint purpose or object is to build up an export trade and to encourage domestic manufactures*, and one or the other of these objects may be said, in general, to be the basis of all drawback laws."

Opinion of Attorney General Bonaparte, December 4, 1908 (27 Op. 113), sustaining the opinion of Solicitor General Phillips, quoted with approval in *Swan & Finch Co., v. The United States, supra*:

"The decision was largely rested on the question of intent, it being held that in order to constitute a *bona fide exportation* it was necessary that the owner of the whisky should intend that it should not only be landed in a foreign port, but that it should enter into the *commerce of such country*.

* * * * *

"There has never been a contrary view expressed by this department."

Attorney General Wickersham said (27 Op. 440, 446-1909):

"As above shown, under the general customs laws, the entering of merchandise for immediate exportation and without any intent that it shall *enter into the commerce of the country*, is not an importation."

See also Attorney General Wickersham in 28 Op. 173.

The main purpose of drawback statutes having been stated in the original act of 1791, as "for the encouragement of the export trade," having been repeated in later legislation, and having been so construed by the courts, I am of opinion that the sending of goods out of this country merely for the purpose of destruction does not constitute an "exportation" within the intent of the drawback statute in question.

I am reinforced in this view by the fact that even with respect to the general customs statutes the courts have almost uniformly construed the words "export" and "exportation," "import," "importation," as embodying the idea of introduction of merchandise into a country for consumption, use, or sale.

As to "export" see cases *supra*; and see also *Flagler v. Kidd* (1897), 78 Fed. 341 (overruling 54 Fed. 367), where in construing the meaning of "export" under Revised Statutes, section 3330, it was held that "the intent characterizes the act and determines its legal complexion."

As to "import" see *The Boston* (1812), 1 Gall. 239, 245, in which Mr. Justice Story, referring to the case of *The Mary*, 1 Gall. 206 (1912), said:

"It was there held that, to constitute an importation, the cargo must be brought into port *voluntarily*, and with an

intention that the same should be there landed or disposed of. It must not barely arrive within the port, but must arrive there *voluntarily*, and, as Lord Hale expresses it (Hale on Customs, Hargraves, Law tracts, 213), '*the goods ought to be imported by way of merchandize.*'"

In *The Gertrude* (1844), 3 Story, 68, 71, it was said:

"If we look through the whole of the numerous acts of Congress laying duties on merchandise imported, as well as those regulating the collection of the same, we shall find they uniformly contemplate the cargo; they refer to articles having the quality of *merchandise* in the ordinary and most popular sense of the word. They refer also to goods intended to be introduced into the country for *sale and consumption, or for the general purposes of commerce.*"

In *McLean v. Hager* (1887), 31 Fed. 602, the question involved being whether opium shipped from Honolulu to Panama, by way of San Francisco, where it was to be transferred without landing to another steamship, was imported, the court said: 604

"It was never intended to be brought into the United States *for consumption or sale there*. It was never intended *to enter into the commerce of the country*. It was not imported into the United States in any proper sense of the term."

It is urged by the claimants that the provisions of Revised Statutes, sections 3041, 3043, 3044, 3045, 3047, show an intent on the part of Congress that drawbacks shall be due whenever the goods actually leave the United States or, at the utmost, whenever they actually reach a foreign port. The above sections provide in brief that where any merchandise is "exported" the "exporter" is entitled to a debenture for the amount of the drawback; that no debenture shall be delivered "in case of exportation" until the exporter shall give bond not to reland the merchandise in the United States, and to produce certificates that the merchandise has been delivered without the United States; such bond may be discharged upon production of a certificate (landing certificate) from certain parties at the foreign port to the effect that the goods "have been received

by them from on board the vessel;" that in case of loss at sea or other accident whereby such certificates can not be had the exporter may produce other proofs.

None of the above provisions, however, are applicable except in a case where there is an actual exportation within the meaning of the drawback statute; and, as stated *supra*, I am of opinion that shipping of merchandise out of the United States simply for destruction does not constitute such exportation. In an opinion rendered to the Secretary of the Treasury October 24, 1916, relative to an alleged exportation of antimonial lead, I have already held that the shipping of such lead to a foreign port and its immediate reshipment to this country does not constitute an exportation within the meaning of the withdrawal for export section of the tariff acts of 1897 and 1909.

Claimants urge in support of their contention the following expressions used in the opinion of Solicitor General Taft, of September, 1890 (19 Op. 642), *supra*:

"The right to drawback can not be said to accompany the goods after they are *in transitu* to a foreign port. As soon as it becomes absolute the beneficiary is fixed and the right becomes a chose in action, personal to the shipper, and no longer attached to the goods. The law plainly intended to reward the person causing the export, who is the shipper. To hold that the drawback follows the title to the goods to foreign shores is to give the section extra-territorial effect, and is to continue the regulation between the drawback and the goods after the object of creating the relation has been accomplished. Such a construction is therefore not reasonable."

No question of the good faith of the exportation for sale abroad or entry into the commerce of a foreign country was involved in the case, however, or was considered by Mr. Taft. The question presented to him was whether the importer of the material who paid the duty thereon, the manufacturer of the article exported in which the material was incorporated, the owner and shipper of the article to whom the bill of lading had been issued, or the foreign vendee was entitled to the drawback. He held that the proper person to receive the drawback was the owner and shipper to the foreign port, and the language quoted *supra*

in his opinion was used to indicate the person in whom the right to the drawback was vested.

The case now before me, however, involves the question whether on this particular shipment any right to drawback ever accrued to any one.

Claimants further urge that the purpose of granting drawbacks is not to encourage export trade, but to grant a bounty to domestic manufacturers, and they cite *Downs v. United States* (1903), 187 U. S. 496. That case, however, did not involve the construction of any drawback statute, and an incidental remark or *dictum* as to drawback as a bounty can not be considered to overrule the express decision to the contrary in *Campbell v. United States* (1882), 107 U. S. 407, 413, where the character of a drawback allowance similar to the one here under consideration was distinctly in issue, the Government contending that the allowance constituted a gratuity.

The claimants contend that the duty of the Secretary of the Treasury is purely ministerial, and that, where the regulations prescribed by law have been complied with, the drawback must be paid. However true this may be as an abstract proposition, it does not touch the question of the right of the Secretary of the Treasury to determine whether in any particular case goods have been "exported" within the meaning of the statute.

See *Tidewater Oil Co. v. United States* (1898), 171 U. S. 210.

The opinion above expressed by me is in consonance with the rule previously adopted by the Supreme Court, and reiterated in its opinion in the case of *Swan & Finch Co. v. United States*, involving claims to drawbacks under a statute embodying practically the same language as that upon which these claims are based. The court said (190 U. S. pp. 146, 147):

"Being a governmental grant of a privilege or benefit it is to be construed in favor of the Government and against the party claiming the grant. * * *

"On the other hand, in *Hannibal, etc., Railroad Co. v. Packet Co.*, 125 U. S. 260, 271, we said, citing several authorities:

“ But if there be any doubt as to the proper construction of this statute * * * then that construction must be adopted which is most advantageous to the interests of the Government. The statute being a grant of a privilege, must be construed most strongly in favor of the grantor.”

I am, therefore, of opinion, that the Secretary of the Treasury should decline to pay the claims for drawback in question.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

CANCELLATION ON WAREHOUSE BONDS—ANTIMONIAL
LEAD.

Antimonial lead, which is a combination of metals obtained from the smelting or refining process, is a “refined metal” within the meaning of section 29 of the tariff act of July 24, 1897 (30 Stat. 210), and might be exported and cancellations or credits had upon the warehouse bond in the ratio of the respective metals contained in the imported ore or bullion.

Under the tariff act of July 24, 1897, the withdrawal by the American Smelting & Refining Co. of antimonial lead for ostensible export and its shipment abroad and return to the United States for the sole purpose of securing a reduction of duty upon it, rendered the company liable for the difference between the amount paid as duty upon the metal when returned to this country (viz, 1½ cents on the lead contents) and the amount allowed as cancellation of the bonds upon withdrawal for the fraudulent export (viz, 2½ cents per pound).

Under the tariff act of August 5, 1909 (36 Stat. 89), antimonial lead was entitled to withdrawal for domestic consumption upon the payment of a duty of 1½ cents per lead pound, and the same rate of cancellation upon the bond was allowed when such metal was withdrawn for export; and hence the company is not liable for the difference between the cancellation of 2½ cents per gross pound, erroneously made upon the bond, and the 1½ cents per lead pound paid upon reintroduction.

DEPARTMENT OF JUSTICE,

October 24, 1916.

SIR: In a letter dated October 3, 1914, and supplementing your previous letter of that date, in effect you present the following statement of fact:

Under section 29 of the tariff act of 1897, providing for the designation of smelting and refining plants as bonded

warehouses and permitting such plants to import crude ores or metals for smelting or refining free of duties, upon giving the necessary bonds for reexportation of the refined metal or payment of duties in cases of withdrawal for domestic consumption, and under the regulations of the Treasury Department established pursuant thereto, the plant of the American Smelting & Refining Co. at Perth Amboy, N. J., was designated as such a bonded smelting and refining warehouse, and executed a bond on June 3, 1901, conditioned generally as provided by the section and conformable to the regulations then in force. After the passage of the tariff act of 1909, section 24 of which covered the importation, under bond, for smelting and refining, of lead ores or crude lead, the regulations of the department on the subject, as far as applicable, were continued in force (T. D. 29939), and on January 18, 1910, were amended (T. D. 30703) to cover the subject more explicitly.

The American Smelting & Refining Co. has made various withdrawals of the smelted and refined product of the lead-bearing ores or bullion imported by it, 1902 to 1911, for ostensible transportation and exportation, with a view to securing a cancellation of the charges upon its bond. In the cancellation of the charges against the bond, upon such withdrawals, credit has been given on certain by-products for "antimonial lead" exported, on the basis of $2\frac{1}{2}$ cents per pound on the bullion weight.

In many cases arising between 1902 and 1911, this "antimonial lead," which had been credited upon the bond at $2\frac{1}{2}$ cents per pound on the bullion weight, that is, the export weight plus wastage, while withdrawn for declared export, was returned to prior purchasers in the United States, either by the same vessel in which it was sent abroad or in other vessels, entered for domestic consumption as type metal, and duty paid thereon at the rate of $1\frac{1}{2}$ cents per pound on the lead contents.

On each of these withdrawals, an attorney for the company executed, under oath, a declaration to the effect that the refined material withdrawn was truly intended to be exported to a foreign port named, "and that it was

not intended to be relanded or consumed within the limits of the United States." In addition to this declaration under oath, a bond was given, conditioned that the metal should be duly landed and delivered at the foreign port named, and should not be relanded or consumed within the limits of the United States except upon due entry and withdrawal for consumption on payment of duties at any port of entry or delivery on the said route.

As a matter of fact, notwithstanding such declarations under oath and the giving of such bonds for transportation and exportation, the evidence now in hand shows that the American Smelting & Refining Co. knew at the time of the shipments of the metal abroad that it was to be returned to the United States. These returns were accomplished in some instances by simulated sales to the Hoyt Metal Co. which, in turn, sold the metal to American consumers, whereupon the American Smelting & Refining Co. made withdrawals for transportation and exportation; in many instances the metal was placed upon ships and round trip sea voyages made, without any landing abroad; and upon its return to the United States entries were made, the merchandise classified and passed as type metal, and duties paid at the rate of $1\frac{1}{2}$ cents per pound on the lead contents. Details of the manner in which the Hoyt Metal Co. conducted these simulated exportations, reimportations, and pretended sales to foreign consumers who, acting merely as agents, in return, shipped it back to American consumers, are presented *in extenso*. The statement is also made that the American Smelting & Refining Co. had full knowledge that practically its entire output of antimonial lead was being returned to the United States by this circuitous route. These transactions are stated to have occurred chiefly during the period between 1902 and 1911.

The facts presented involve the following questions:

I.

Whether antimonial lead was entitled to withdrawal as a refined metal under section 29 of the tariff act of 1897.

II.

Whether the withdrawal of antimonial lead for ostensible export and its shipment abroad and return to the United States in the manner detailed by you entitled the smelting or refining company to cancellations on its bond at the rate of $2\frac{1}{2}$ cents per pound and a return of the metal to this country as type metal upon payment of a duty of $1\frac{1}{2}$ cents per pound upon the lead contents:

- (a) Under section 29 of the tariff act of 1897;
- (b) Under sections 23 and 24 of the tariff act of 1909.

I.

Section 29 of the tariff act of 1897 (30 Stat. 210, 211, Chap. XI), provides:

"That the works of manufacturers engaged in smelting or refining metals, or both smelting and refining, in the United States may be designated as bonded warehouses under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That such manufacturers shall first give satisfactory bonds to the Secretary of the Treasury. Ores or metals in any crude form requiring smelting or refining to make them readily available in the arts, imported into the United States to be smelted or refined and intended to be exported in a refined but unmanufactured state, shall, under such rules as the Secretary of the Treasury may prescribe, and under the direction of the proper officer, be removed in original packages or in bulk from the vessel or other vehicle on which they have been imported, or from the bonded warehouse in which the same may be, into the bonded warehouse in which such smelting or refining, or both, may be carried on, for the purpose of being smelted or refined, or both, without payment of duties thereon, and may there be smelted or refined, together with other metals of home or foreign production: *Provided*, That each day a *quantity of refined metal equal to ninety per centum of the amount of imported metal smelted or refined that day shall be set aside*, and such metal so set aside shall not be taken from said works except for transportation to another bonded ware-

house or for exportation, under the direction of the proper officer having charge thereof as aforesaid, whose certificate, describing the articles by their marks or otherwise, the quantity, the date of importation, and the name of vessel or other vehicle by which it was imported, with such additional particulars as may from time to time be required, shall be received by the collector of customs as sufficient evidence of the exportation of the metal, or it may be removed under such regulations as the Secretary of the Treasury may prescribe, upon entry and payment of duties, for domestic consumption, and the exportation of the ninety per centum of metals hereinbefore provided for shall entitle the ores and metals imported under the provisions of this section to admission without payment of the duties thereon: *Provided further*, That in respect to lead ores imported under the provisions of this section the refined metal set aside shall either be reexported or the regular duties paid thereon within six months from the date of the receipt of the ore. All labor performed and services rendered under these regulations shall be under the supervision of an officer of the customs, to be appointed by the Secretary of the Treasury, and at the expense of the manufacturer."

Article 1081, Customs Regulations, 1899, provided:

"In case two dutiable metals are recovered in the smelting and refining process in a combined form, for example, lead and antimony as "antimonial lead," the percentages of lead and antimony contained therein shall be determined by assay, and the quantities so determined, when withdrawn, shall be properly credited on the respective bonds to which they appertain."

This article was amended in the Customs Regulations of 1908, so as to provide (article 545):

"In case two or more dutiable metals are recovered in the smelting or refining process from the same ore or crude metal, for example, lead and antimony as "antimonial lead," a separate account of the quantity of each metal so recovered shall be kept by the governmental official in charge, and before the bond given to cover the importation shall be canceled 90 per cent of each of the kinds of metal recovered from the material must be exported."

The opinion of the Attorney General of January 26, 1903, authorized the liquidation of the charges against the warehouse refining bond "on the exportation of 90 per cent of the metal contents * * * whether consisting of one or more metals beside the lead" (24 Op. 569). It seems, therefore, to have been a practice sanctioned by the Secretary of the Treasury; and recognized apparently by the Attorney General, to permit the exportation of "antimonial lead" as a "refined metal," in satisfaction of the requirements of section 29 of the act of 1897, and to make corresponding cancellations upon the bond.

I have no question that the Treasury decisions purporting to be promulgated in accordance with the terms of the act of 1897, and the opinion of the Attorney General, contain a practical departmental construction of that act, which should now be followed, and that the combination of two or more metals obtained from the smelting or refining process is a "refined metal" within the meaning of that act, and might be exported and cancellations or credits had upon the warehouse bond in the ratio of the respective metals contained in the imported ore or bullion.

II.

(a) Article 544, Customs Regulations, 1908, pursuant to the provisions of section 29 of the tariff act of 1897, provides for the withdrawal for exportation of smelted or refined metals produced in bonded smelting warehouses in the following language:

"Upon the withdrawal for consumption in the United States of any portion of the smelted or refined dutiable metal or metals set aside and stored, as herein prescribed. * * * On the *exportation* of such smelted or refined metal or metals credit will be given on the warehouse bond for the ore or crude metal covered thereby. * * *"

Section 29 of the tariff act of 1897 provides:

"And the exportation of the 90 per centum of metals heretofore provided for shall entitle the ores and metals imported under the provisions of this section to admission without payment of the duties thereon."

The general warehouse smelting bond of the company provided that the refined metals set aside as therein prescribed should be taken from the warehouse only for consumption or "export." Upon each withdrawal of metal from said warehouse a declaration under oath was made by an attorney of the company that the refined metal withdrawn was "truly intended to be *exported* to the port of Hamburg * * * and is not intended to be relanded or consumed within the limits of the United States." In the bond give for transportation and exportation it was provided that the refined metal withdrawn should be "duly landed and delivered at Hamburg and should not * * * be relanded or consumed within the limits of the United States, except upon due entry and withdrawal for consumption on payment of duties at any *port of entry or delivery on the said route*, in case the obligors, their agents or consignees, should so elect."

The Customs Regulations, then, as a prerequisite to cancellations on the bond, required a promise of exportation of the refined metal withdrawn, the statutes applicable required such exportation, the declarations under oath stated that the metal was withdrawn for exportation, and the exportation bond was conditioned upon a landing at the foreign port to which consigned, unless entered and duty paid at some domestic port on the route. Exportation of the refined metal was contemplated and required in the Customs Regulations and in the law, was promised in the sworn declaration, and both bonds were conditioned upon it.

Accordingly, the only question to be resolved is whether the shipment of this refined metal (and it is conceded that an alloy might be shipped) and its return to the United States in the manner detailed by the Secretary of the Treasury, i. e., with the full intent on the part of the consignee to ship the metal back for entry here and the payment of duty at a lower rate than had been credited upon the warehousing bond—a practice which was consummated by various devices, such as simulated sales to foreign dealers who were really only agents paid to ship the metal from abroad, frequently without landing it at a foreign

port or even transferring it to other vessels—constituted *bona fide* exportations and warranted the cancellations on the bond.

Considering the applicability of section 30 of the Act of July 24, 1897, providing for the payment of drawbacks of duty upon exportation of articles manufactured in the United States from imported materials when such articles were consumed on board the vessel during its voyage to a foreign port, Mr. Justice Brewer, for the Supreme Court, in *Swan & Finch Co. v. United States*, 190 U. S. 143, defined the word "export," as employed in drawback statutes, explicitly, saying (pp. 144, 145):

"* * * Whatever primary meaning may be indicated by its derivation, the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country. 'As the legal notion of emigrating is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other.' 17 Op. Attys. Gen., 583."

This is an analogous statute, extending a benefit to the domestic manufacturer, and obviously, under the facts detailed by the Secretary of the Treasury, in the methods employed, such as sales of refined metal to domestic consumers prior to its shipment abroad, there was never any intention on the part of the American company to unite this metal with the "mass of things belonging to some foreign country." It was shipped out of the United States for the sole purpose of securing a reduction of duty upon it, in palpable evasion of the provisions of section 29 of the act of 1897.

And, again (p. 146):

"* * * The purpose with which the drawback statute was enacted is against it. In *Campbell v. United States*, 107 U. S. 407, 413, we said:

"The purpose of the drawback provision is to make duty free, imports which are manufactured here and then returned whence they came or to some other foreign coun-

try—articles which are not sold or consumed in the United States.’”

The purpose for which the statutes under consideration were enacted is likewise against such a construction of the term exportation. As said by the Circuit Court of Appeals for the Third Circuit, in re *Guggenheim Smelting Co.* 126 Fed. 731, in setting out the purpose for which section 29 of the tariff act of 1897 was enacted:

“* * * Metals imported and dealt with under its provisions (sec. 29) do not enter into the markets of the United States, and consequently do not come into competition with any of their industries.”

But under the practice detailed the metals, so ostensibly exported and then brought back, did enter into the markets of the United States up to 1909, at least, at a lower rate of duty than would have been possible if directly imported.

Considering the meaning of the term “export” as used in section 3380, Revised Statutes, which authorizes withdrawals for export of distilled spirits without payment of internal-revenue tax—a statute analogous to this, in that it waives the payment of taxes imposed under ordinary circumstances—Circuit Judge Wallace, for the Circuit Court of Appeals, Second Circuit, in *Flagler v. Kidd*, 78 Fed. 341, 344, said:

“Ordinarily, goods are exported when they are carried out of the country for the purpose of being transferred to a foreign situs. Goods en route from one place to another in the United States are not exported merely because, while in transit, in cars or vessels, they may be temporarily outside the boundaries, or within the boundaries of a foreign country. Conversely, goods are imported when they are brought within the country with intent to land them here. The intent characterizes the act and determines its legal complexion.” *U. S. v. Vowell*, 5 Cranch, 368; *The Mary*, 1 Gall. 206, Fed. Cas. No. 9, 183; *The Bos-General* (17 Op. 579) heretofore quoted from, that—

If, as stated, “the intent characterizes the act and determines its legal complexion,” there can be but one answer to the question here under consideration. The intent here,

under the facts detailed in the letter of the Secretary of the Treasury, was not to make a *bona fide* exportation but only to secure a lower rate of duty on the refined product.

The proper construction of the term "import," as used in statutes of this character, that is, those extending a benefit to the manufactures of this country for the purpose of encouraging home industries by the remission of duties, whether excise or custom, upon domestic manufactures, is discussed in an opinion by General Appraiser Sommerville, rendered December 23, 1910 (T. D. 31143¹). The question there was whether merchandise withdrawn from a bonded warehouse and shipped abroad with the intention of bringing it back and reentering it in bond should be reappraised on reimportation, or be subject to duty on the basis of its value at the time of the original importation. He held, citing the opinion of the Attorney General (17 Op. 579) heretofore quoted from, that—

"The carrying of goods out of this country with no intention to seek a foreign market, but only to bring them back, is not a *bona fide* importation where they subsequently arrive in this country."

And that—

"The exportation of the article to London and its reimportation did not constitute a *bona fide* importation within the meaning of the law, for the reason that it was not the purpose, when the mica was exported from Boston to London, that it should enter into the commerce of Great Britain, the only purpose being to extend the limit in which it might remain in bonded warehouse."

In that case the only purpose was to seek an extension of the statutory benefits accorded by the Government beyond the limits fixed by the statutes conferring them. In this case the only purpose of the shipment abroad of the refined products of its plants by the American Smelting and Refining Co. manifestly was to obtain an additional benefit to that accorded it by section 29 of the act of 1897,

¹ Cited with approval in the following abstract decisions: 30016 (T. D. 32858); 28787 (T. D. 82618); and 27310 (T. D. 32073).

a purpose wholly out of harmony with the statute, and clearly contrary to the motive which induced the Congress to enact it.

The practices detailed here, from 1902 to the time of the taking effect of the act of 1909, in violation of the sworn declarations made upon withdrawal, did not fulfill the conditions of either the general warehousing bond or the exportation bond, and were contrary to and in palpable and fraudulent evasion of the law—so clearly so that discussion of the rate at which cancellations should have been allowed on the bond upon the withdrawal of the antimonial lead for ostensible export is unnecessary. Under the facts stated by you, the cancellations on the bond were fraudulently procured, since there was never a *bona fide* export.

In my opinion, therefore, under the tariff act of 1897, the company is liable for the difference between the amount paid as duty upon the metal when returned to this country (viz, $1\frac{1}{2}$ cents on the lead contents) and the amount allowed as cancellations of the bonds upon withdrawal for the fraudulent export (viz, $2\frac{1}{2}$ cents per pound).

(b) The tariff act of 1909, in providing for withdrawal for exportation and cancellation of bonds, refers in terms to "the actual amount of lead produced from the smelting or refining, or both, of such ores or crude metals," and not to "a quantity of refined metal," etc., as in the act of 1897.

Section 24 of the tariff act of 1909 (36 Stat. 89), provides:

"That the works of manufacturers engaged in smelting or refining, or both, of ores and crude metals, may upon the giving of satisfactory bonds be designated as bonded smelting warehouses. Ores or crude metals may be removed from the vessel or other vehicle in which imported, or from a bonded warehouse, into a bonded smelting warehouse without the payment of duties thereon and there smelted or refined, or both, together with other ores or crude metals of home or foreign production: *Provided*, That the several charges against such bonds may be cancelled upon the exportation or delivery to a bonded manu-

facturing warehouse, established under section twenty-three of this act, of the actual amount of *lead* produced from the smelting or refining, or both, of such ores or crude metals: *And provided further*, That *said lead* may be withdrawn for domestic consumption or transferred to a bonded customs warehouse and withdrawn therefrom upon the payment of the duties chargeable against it *in that condition*: *Provided further*, That all labor performed and services rendered pursuant to this section shall be under the supervision of an officer of the customs, to be appointed by the Secretary of the Treasury, and at the expense of the manufacturer: *Provided further*, That all regulations for the carrying out of this section shall be prescribed by the Secretary of the Treasury."

Section 23 of the act of 1909 provided in part:

"*Provided*, That the waste material or *by-products* incident to the process of manufacture in said bonded warehouses may be withdrawn for domestic consumption on the payment of duty equal to the duty which would be assessed and collected, by law, if such waste or by-products were imported from a foreign country. All labor performed and services rendered under these provisions shall be under the supervision of a duly designated officer of the customs and at the expense of the manufacturer."

Section 24 was first administered under T. D. 29939, continuing in force the applicable provisions of the Customs Regulations of 1903.

December 4, 1909, T. D. 30157 was issued providing:

"Section 24 of the tariff act of August 5, 1909, relating to the smelting and refining of ores and crude metals in bond, provides that the special charge against the bond may be cancelled upon the exportation of the actual amount of lead produced from the smelting or refining, or both, of such ores or crude metals.

"In view of this provision of law it now becomes necessary to assay base bullion for the purpose of determining the percentages of lead contained therein, as well as to assay ores for the lead content, and you are, therefore, directed to have all base bullion which is imported and placed in a bonded refinery assayed for the lead contents."

After the promulgation of this decision the quantity of lead necessary to be exported was definitely fixed by the assay, regardless of the amount produced.

On June 18, 1910, T. D. 30703, continuing T. D. 30157 in force, was issued, and thereafter section 24, was administered thereunder. T. D. 30703 also supersedes article 545 of the Customs Regulations of 1908, *supra*.

In section 4 of T. D. 30703 it is provided:

"Section 24, act of August 5, 1909, provides that the charges against the bond may be cancelled upon the exportation or delivery to a bonded warehouse or bonded manufacturing warehouse of the actual amount of lead produced from the smelting or refining, or both, of the ore or crude metals. The allowance to be made for wastage in smelting and refining shall be ascertained and fixed by the Secretary of the Treasury for each smelting warehouse and for each refining warehouse and for each combined smelting and refining warehouse bonded under section 24. The lead contents of the imported ore or crude metals as ascertained by assay, less the wastage allowance, shall be the quantity of *dutiable lead* which must be either exported, transferred to a bonded manufacturing warehouse, bonded customs warehouse, or withdrawn for consumption, in order to secure the cancellation of the charge made against the bond: *Provided, however,* That upon the withdrawal for consumption of metals smelted or refined under the provisions of section 24, the duty shall be assessed upon the gross weight of the metals, and if withdrawn for transfer to a bonded customs warehouse, the bond shall be charged with the gross weight of the metal received into the said warehouse: *And provided further,* That an assay shall be made of such metals which are to be withdrawn for consumption, exportation, or transfer to a bonded customs warehouse."

The act of 1909 is not so definite in its terms as the act of 1897, nor has its construction been so clearly fixed by Treasury regulations. It does provide, however, that the charges on the bond may be canceled upon the exportation "of the actual amount of lead produced from the smelting or refining, or both." I am informed that smelt-

ing practically never, and refining rarely, produces an entire lead product. There is almost universally a resulting by-product, which generally contains a sufficient amount of antimony to fit the alloy for use as type metal. It is this particular by-product about which inquiry is now made.

In *American Smelting and Refining Co. v. United States* (1911), 2 Ct. Cust. App. 231, it was held that under the second proviso of section 24 of the act of 1909, viz:

“That said lead may be withdrawn for domestic consumption or transferred to a bonded customs warehouse and withdrawn therefrom upon the payment of the duties chargeable against it *in that condition*,”

this by-product, containing the required amount of antimony, might be withdrawn for consumption upon the payment of duty on the lead contained therein at $1\frac{1}{2}$ cents per pound upon its lead contents as type metal, instead of $2\frac{1}{2}$ cents per pound as lead bullion, which the Government demanded. The court said:

“On this state of facts there is but one question presented by this appeal, and that is, What construction should be put upon section 24, and particularly upon that part of it *dealing with lead withdrawn for domestic consumption*? That section provides in effect: * * *

“Fourth. That said lead may be withdrawn for domestic consumption upon payment of the duties chargeable against it *in that condition*. (Italics in text.)

“It seems to us that these provisions indicate with a fair degree of clearness that lead produced in bonded smelting warehouses by the smelting or refining of imported ores or crude metals may be withdrawn for domestic consumption upon the payment of the duties chargeable against it in its smelted or refined condition.

“Instead of making the withdrawal of such lead dependent upon the payment of the duties which attached to it in its imported condition, Congress explicitly provided that it might be withdrawn on the payment of the duties chargeable against it in that condition, that is to say, the condition in which it was found after smelting or refining, or both.” * * *

"Section 23 provides that by-products incident to the processes of manufacture in bonded manufacturing warehouses may be withdrawn for domestic consumption upon the payment of a duty equal to the duty which would be assessed and collected by law if such by-products were imported from a foreign country. It seems to us that the second proviso of section 24 had a similar purpose in view, and that it was designed and intended by Congress to put lead products resulting from the smelting or refining of ores or crude metals in bonded smelting warehouses in the same position with respect to duty as by-products of bonded manufacturing warehouses and in no worse position than imported materials of the same kind. Certainly it would be anomalous that the by-product of a bonded smelting warehouse should be made dutiable on a basis different from that fixed for the by-products of bonded manufacturing warehouses."

The principle of this decision, permitting the withdrawal of antimonial lead for domestic consumption upon the payment of a duty of $1\frac{1}{2}$ cents per lead pound (which, of course, was credited on the bond), would naturally authorize its withdrawal for export upon the same basis of cancellation upon the bond. To secure a proper balance, the basis fixed for charging duty on the metal when withdrawn for domestic consumption must exactly equal the rate of cancellation when withdrawn for export. If the rate of duty charged upon withdrawal for domestic consumption had been greater than the rate of cancellation allowed upon the bond on withdrawal for export, necessarily no metal would have been withdrawn for domestic consumption; and, on the other hand, if the cancellation upon export had exceeded the rate of duty on the metal withdrawn for domestic consumption, all of it would have been exported. The two rates must balance. It was this very lack of balance, between the department's cancellation rate and the tariff duty that caused the smelting and refining companies to resort to the fraudulent and evasive methods which were practiced. Under the regulations of the Treasury Department they could withdraw the metal for declared export and receive an allowance in cancella-

tion of $2\frac{1}{2}$ cents per gross pound upon their bond and then reintroduce it under the tariff law upon payment of a customs duty of $1\frac{1}{2}$ cents per lead pound.

The decisions and instructions of the Treasury Department permitted withdrawal of the metal for domestic consumption upon the payment of a duty of $2\frac{1}{2}$ cents per gross pound, as lead bullion, and cancellations were made upon the bond when the metal was withdrawn for export upon precisely the same basis, viz, $2\frac{1}{2}$ cents per gross pound. Under the decision of the Court of Customs Appeals, *supra*, the practice of the department in collecting a duty of $2\frac{1}{2}$ cents per gross pound upon withdrawal for domestic consumption was wrong, and the metal was entitled to such withdrawal upon the payment of $1\frac{1}{2}$ cents per lead pound. It followed that the cancellations upon the bond, when the metal was withdrawn for export, should have been made at the same rate, viz, $1\frac{1}{2}$ cents per lead pound, instead of $2\frac{1}{2}$ cents per gross pound, as they were made.

It is true that the smelting and refining companies withdrew the metal for declared export with a view of securing the advantage of cancellation at the rate of $2\frac{1}{2}$ cents per gross pound and then reintroducing it into the commerce of this country at the lesser rate of $1\frac{1}{2}$ cents per lead pound. There was in fact a fraudulent attempt to evade the law; but since, under the decision of the court the metal was entitled to direct withdrawal for consumption here at the $1\frac{1}{2}$ -cent rate and no greater rate of cancellation should have been made upon the bond when withdrawn for export, the Government has suffered no loss, notwithstanding the circuitous methods employed. I am of opinion that they are not liable for the difference between the cancellation of $2\frac{1}{2}$ cents per gross pound, erroneously made upon the bond, and the $1\frac{1}{2}$ cents per lead pound paid upon reintroduction, which was the proper rate under the tariff laws if the metal should be considered as having been imported and under the decision of the Court of Customs Appeals if it should be considered as having been withdrawn for domestic consumption, as it in effect was.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

CANCELLATION ON WAREHOUSE BONDS—IMPORTED
BULLION.

Under section 29 of the tariff act of July 24, 1897 (30 Stat. 210), providing for cancellation on warehouse bonds upon the exportation of ninety per centum of the refined metal produced from the imported bullion, it was incumbent upon the refining company to ascertain, set aside and export the metals in the exact proportions in which they were contained in the bullion; and refined metal, neither derived from the bullion imported nor set aside in the representative proportions of the metal contents of such bullion, cannot constitute any portion of the ninety per centum export required for cancellation on its bond.

DEPARTMENT OF JUSTICE,

October 24, 1916.

SIR: I have the honor to acknowledge receipt of your letters of October 3, 1914, August 4, 1915, and February 9, 1916, with reference to the construction of section 29 of the tariff act of July 24, 1897, chapter 11 (30 Stat. 151), pages 210, 211, which provides as follows:

"That the works of manufacturers engaged in smelting or refining metals, or both smelting and refining, in the United States may be designated as bonded warehouses under such regulations as the Secretary of the Treasury may prescribe: provided, that such manufacturers shall first give satisfactory bonds to the Secretary of the Treasury. Ores or metals in any crude form requiring smelting or refining to make them readily available in the arts, imported into the United States to be smelted or refined and intended to be exported in a refined but unmanufactured state, shall, under such rules as the Secretary of the Treasury may prescribe, and under the direction of the proper officer, be removed in original packages or in bulk from the vessel or other vehicle on which they have been imported, or from the bonded warehouse in which the same may be, into the bonded warehouse in which such smelting or refining, or both, may be carried on, for the purpose of being smelted or refined, or both, without payment of duties thereon, and may there be smelted or refined, together with other metals of home or foreign production: *Provided*, that each day a quantity of refined metal equal to ninety

per centum of the amount of imported metal smelted or refined that day shall be set aside, and such metal so set aside shall not be taken from said works except for transportation to another bonded warehouse or for exportation, under the direction of the proper officer having charge thereof as aforesaid, whose certificate, describing the articles by their marks or otherwise, the quantity, the date of importation, and the name of vessel or other vehicle by which it was imported, with such additional particulars as may from time to time be required, shall be received by the collector of customs as sufficient evidence of the exportation of the metal, or it may be removed under such regulations as the Secretary of the Treasury may prescribe, upon entry and payment of duties, for domestic consumption, and the exportation of the ninety per centum of metals hereinbefore provided for shall entitle the ores and metals imported under the provisions of this section to admission without payment of the duties thereon: *Provided further*, That in respect to lead ores imported under the provisions of this section the refined metal set aside shall either be reexported or the regular duties paid thereon within six months from the date of the receipt of the ore. All labor performed and services rendered under these regulations shall be under the supervision of an officer of the customs, to be appointed by the Secretary of the Treasury, and at the expense of the manufacturer."

The following facts appear in your letters:

Under the foregoing statute and various regulations prescribed by the Treasury Department certain corporations have established bonded warehouses, and have given bonds conditioned in accordance with the provisions of section 29 and embodied the following language with reference to the withdrawal or export of smelted or refined metal:

"And shall either withdraw *such metal so set aside, representing the metal smelted and refined from imported crude metal*, for consumption, or export the same within three years from the date of the importation of the crude metal; and shall also, either withdraw *such metal so set aside representing the metal smelted and refined from imported crude ore*, for consumption, or export the same

within six months from the date of the receipt of the crude ore."

The question here presented is one involving the process of refining only and not smelting. The *crude metal imported and refined* in the bonded warehouse of one corporation consisted entirely of lead bullion, which under paragraph 182 of the tariff act of 1897 was assessed with duty upon importation on its gross weight at $2\frac{1}{2}$ cents per pound. Under the opinions of Attorney General (24 Op. 45 and 569) and Treasury Decisions (23,859 and 24,209) no assay was made of this bullion to ascertain the percentages of the various kinds of metal contained therein.

Various withdrawals of refined metal for export were made, these withdrawals stating distinctly that such refined metals were produced from certain imported bullion and that upon the exportation of a weight of refined metal equal to ninety per centum of the weight of imported bullion, the charges for duties on the bonds were canceled, *regardless of the character of the refined metals exported.*

In the absence of a customs assay of the imported bullion the customs records do not show what quantities of lead and other metals were contained in such imported bullion, but they do show the quantities of the respective refined metals exported.

It is stated that the books of one corporation show an export of refined metal equal to ninety per cent of the bullion imported, *but the metal so exported did not equal ninety per cent of each of the metals contained in the imported bullion.*

It appears also that, with respect to one corporation, while the imported bullion contained only about two-tenths of one per cent of copper, yet copper was exported to the amount of 2.7 per cent of the weight of the imported bullion. With respect to another corporation, while the imported bullion contained only about four-tenths of 1 per cent of copper, yet copper was exported to the amount of 3.8 per cent of the weight of the imported bullion.

The result of this practice has been that large quantities of refined lead derived from this imported bullion have been retained and consumed, or sold for consumption, in

the United States free of duty, and millions of pounds of refined copper obtained elsewhere than from this imported bullion have been substituted therefor to secure cancellation on the bonds and have been exported, in excess of the copper contained in the original imported bullion.

The question presented by you and on which you ask my opinion is: Shall the Treasury Department require payment of duties upon the difference between the weight of the bullion imported and the weight of the refined lead actually exported.

The grounds presented in the foregoing statement as a basis for the proposed demand for additional duties are, briefly:

That the corporation in question, as a partial basis for cancellations upon its bond, has exported as a portion of the requisite 90 per cent of gross bullion weight a large amount of refined copper which was not derived from any of the imported bullion covered by the bond, was not set aside in the manner prescribed by law and required by its bond, and was largely in excess of the proportionate copper contents of such bullion, and has retained free of duty the dutiable lead, in lieu of which this free copper was exported.

The claim of the corporation is understood to be that the provisions of law and the requirements of the department were met upon the exportation of an amount of refined metals of the same character as were contained in the imported bullion, equal to 90 per cent of its gross weight; and that it was not incumbent upon it to reproduce for export the proportionate percentage of each metal content of such bullion.

In my opinion, refined metal neither derived from the bullion imported under the bond, nor set aside in the representative proportions of the metal contents of such bullion, can not constitute any portion of the 90 per cent export required for cancellations on such bond. Such a construction would be wholly subversive of the purpose, spirit, and letter of the law.

Among other things, the act of 1897 states:

"Provided, that each day a quantity of refined metal equal to ninety per centum of the amount of imported metal smelted or refined that day shall be set aside;" and that:

"The exportation of the ninety per centum of metals hereinbefore provided for shall entitle the ores and metals imported under the provisions of this section to admission without payment of the duties thereon."

The "metals hereinbefore provided for" clearly referred only to the "refined metal equal to 90 per cent of imported metal * * * refined" which was to be set aside.

The bond provides that the importer shall "either withdraw such metal so set aside *representing* the metal smelted and refined from imported crude metal for consumption or export the same," etc.

It seems clear that the withdrawal for export of 2.7 per cent of refined copper, which was entitled to free admission, can not *represent* metal refined from a bullion containing but two-tenths of 1 per cent of copper, and that such exports would not meet the conditions of the bond.

As stated by the Secretary of the Treasury, the practice described has resulted in large quantities of refined lead being introduced and consumed or sold for consumption in the United States free of duty. Clearly, no such construction of the law has ever been authorized by any decision of the Treasury Department, opinions of the Attorney General, or findings of any court. The facts with respect to such opinions are: On March 25, 1902, the Secretary of the Treasury requested an opinion as to whether an assay should be made of imported lead bullion to determine the quantity of metal therein, which necessarily involved a determination whether the duty should be established on the basis of 90 per cent of the gross importation weight.

On May 25, 1902, the Attorney General replied that an assay was not necessary as to imported lead bullion, which was substantially pure lead, and that the charges on the bond should be determined by official weighing only. In

support of his view he gave a concrete illustration, by way of calculation, of the loss in proceeds which would be occasioned to the Government on a given amount of bullion if the duty should be established on the basis of 90 per cent of the metal contents of the bullion, as determined by assay, as against charges based on 90 per cent of the gross weight.

On July 9, 1902, Treasury Decision No. 23859, was promulgated, transmitting a copy of the Attorney General's opinion, and instructing the collector that thereafter no assay should be made of lead bullion, which should be assessed for duty on the gross weight. Under this opinion, based as it was, on the assumption that lead bullion was substantially pure lead, the customs officials apparently interpreted the Treasury decision thereunder as requiring an export of 90 per cent of the gross import weight in refined lead; for, thereafter, on January 7, 1903, the Secretary of the Treasury again wrote requesting a further opinion, saying:

"In submitting your opinion thereon to the parties in interest I have discovered additional facts which I think are essential and which were not referred to in the former request.

"It now appears that the bullion under consideration contains somewhat less than ninety per cent lead, and seven or eight per cent antimony. It is urged that if the refining companies are required to export the ninety per cent of the gross weight in lead, it will be necessary for them to purchase American lead to supplement the product of the bullion.

"The question upon which I now desire specific instruction is whether the bond can be liquidated upon the exportation of *an amount of ore equal to ninety per cent of the importation made up of such portions of metals imported as the importer may determine.*"

(NOTE.—The word "ore" was obviously used inadvertently, and should be "metal.")

On January 26, 1903, the Attorney General replied (24 Op. 569):

"Your letter of January 7 suggests, in effect, the reconsideration of my opinion of May 15, last, relative to lead bullion, in the light of additional facts submitted on behalf of parties in interest.

"I have carefully considered the various statements made, but am unable to perceive valid reasons for modifying the views and conclusion which I expressed in that opinion. It makes no particular difference that some importations of lead bullion or base bullion run lower in the percentage of lead and higher in that of antimony than the average, which shows 95 per cent or more of lead. The bond for the amount of duty, which is necessarily determined by gross weight under an enumeration *eo nomine* (paragraph 182, tariff act of 1897), may be liquidated on the exportation of 90 per cent of the *metal contents* ('the amount of imported metal,' sec. 29 of said act), whether consisting of one or more metals beside the lead.

"If I correctly understand your specific inquiry, whether the statutory percentage for exportation may not properly be made up of 'such portions of metals imported as the importer may determine,' this affirmation of my previous opinion requires an answer in the negative. *If it should be urged by parties in interest, against the present construction of the law, that it involves onerous or impracticable results, they should be remitted to Congress.*"

The "metal contents" can refer, of course, only to the contents of the imported ores or bullion; and the express denial by the Attorney General that the ninety per centum of export metal might be made up of "such portions of metals imported—as the importer may determine" precludes any idea that proportions of refined metal might be exported different from those imported.

Pursuant to this opinion, on February 5, 1903, the Secretary of the Treasury in Treasury Decisions No. 24,209, transmitted a copy of the Attorney General's opinion and instructed the collector to be governed by the regulations of Treasury Decisions No. 23,859, *supra*, which had been suspended, and, in addition, advised that

"Bonds will be canceled on the exportation of one, two, or more of the *respective* metals contained in the imported

bullion, which metal, or metals in the aggregate, shall amount to ninety per cent of the gross weight of such bullion.

"To facilitate the liquidation of entries, the books of record of the company may be referred to, or sworn extracts therefrom may be accepted."

By no reasonable construction can it be held that this language entitled an importer to bring in quantities of dutiable bullion under bond, and export refined metal which was neither obtained from the imported bullion nor set aside in the proportions of the metal contents thereof, in satisfaction of the conditions of the bond.

It is not contended that the refined metal to be set aside to be exported is limited to that derived from imported bullion. It is freely conceded that a portion of the export may be derived from domestic bullion, provided the requisite percentage of each metal constituent of the imported bullion is exported. But the provision of the section permitting this was obviously enacted for the convenience of the refiners, to permit them to mingle domestic and imported bullion in a single refining operation, and it can not be tortured into a construction which would change the plain meaning of the remaining language of the statute. The true meaning of section 29 was, moreover, very clearly and decisively determined by tribunals vested with jurisdiction and authority prior and shortly subsequent to the rendition of these opinions and the issuance of the Treasury Decisions.

Section 29 was fully considered and construed in a proceeding before the Board of General Appraisers, November 26, 1901 (T. D. 23,383—G. A. 5,032). The matter came before the board on protest by the Guggenheim Smelting Co., to the effect that the collector's decision requiring the setting aside for export of 90 per cent of the total antimony contents of lead bullion was erroneous. The claim was made that what the section really required was the setting aside of a quantity of antimony equal to 90 per cent of the antimony preserved from the lead bullion by refining. One of the contentions advanced by the Smelting Company was

that 45 per cent of the antimony was lost in the refining process, and consequently the Government regulations "required impossibilities," "nullified the act," and caused "great loss and detriment", since clearly it would not be practicable to export 90 per cent of the antimony contained in the crude bullion when 45 per cent was lost in refining. Answering this contention, the board used an illustration, a hypothetical but concrete case to illustrate its fallacy. Conceding the loss in refining antimony to be 45 per cent, it was stated that antimony constituted but a small percentage of lead bullion, and demonstrated by calculation that the company could well afford to buy the necessary amount of refined antimony to make up the deficiency in the amount required to be exported, or pay the duty and retain the antimony for domestic sale, in view of the dutiable lead, upon which the percentage of wastage was small—much less than the 10 per cent allowed—which it would be enabled to retain free of duty.

The decision of the board was reversed by the District Court for the District of New Jersey (Feb. 28, 1903, *In re Guggenheim Smelting Co.*, 121 Fed. 153), but the judgment of that court in turn was reversed on November 24, 1903, by the United States Circuit Court of Appeals for the Third Circuit (*In re Guggenheim Smelting Co.*, 126 Fed. 728, 731), which affirmed the decision of the Board of General Appraisers, saying at the conclusion of its opinion (p. 731):

"It may be, as has been insisted, that this allowance of 10 per centum for wastage is, at least as to antimony, not as great as it ought to be, but the question thus raised is for consideration by Congress. It is not, under this statute, for solution by the courts."

Construing section 29 the court said (p. 730):

"On the contrary, the requirement is, in terms, that the 90 per centum shall be 'of the amount of the imported metal'—not of the metal smelted or refined 'from' it, as the order appealed from assumes, but of the metal imported under the provisions of this section, and which it entitles 'to admission without payment of the duties thereon.'"

And (p. 730):

"The material to be set aside is refined metal, and from the work of each day that metal is to be obtained. This is plain, but we think it is also obvious that the quantity to be set aside is not to be 90 per centum of the refined metal, but is to be 'equal to 90 per centum of the amount of imported metal.'"

"The imported metal smelted or refined can be no other than the crude metal, *for that only is imported*, and it is that and that only which is smelted or refined. Pure metal is not imported, nor is it subjected to smelting or refining. It is brought into existence after the importation has taken place, and, though this is accomplished by smelting or refining, it certainly is not the pure metal itself, but the imported crude metal, to which the operation of smelting or refining is applied."

Evidently no idea ever entered the mind of the court that the conditions of the bond given for the free importation of crude metal might be met by the exportation of refined metal, neither derived from such importation, nor set aside from the refined products in the proportions imported.

It appears, then, that the idea of a substitution of refined metals of the same character as those contained in the bullion, but in different proportions, to make up the required 90 per cent of gross weight for export, was expressly laid before and considered by the Attorney General and by him tersely and unequivocally rejected in his opinion of January 26, 1903; that the opinion of the Board of Appraisers was based upon the theory that the act required that 90 per cent of each of the constituent metals in the bullion should be exported, even though the loss by wastage in refining any particular metal might be in excess of the 10 per cent allowance and necessitate the purchase of domestic refined metal to make up the deficiency; and that this construction was in all things affirmed and upheld by the Circuit Court of Appeals in the *Guggenheim case*.

Upon consideration of the whole series of transactions connected with the administration by the Treasury Depart-

ment, and the construction and adjudication of section 29, one seeks vainly to find the slightest warrant for the practices alleged to have been indulged in by the refining companies.

Every defense for these practices now presented by counsel for the companies, except those of estoppel by long acquiescence on the part of the Government officials, and of limitation, have been heretofore fully considered and overruled by competent authority. The physical impossibility of compliance with the requirement of 90 per cent exportation of each of the constituent metals was presented to the Attorney General, and he plainly stated that it was a matter for the consideration of Congress. It was presented to the Board of Appraisers and the circuit court of appeals in the Guggenheim case, and a like answer was made there. The claim that the section was in the nature of a protective statute was presented to the Board of General Appraisers and the United States circuit court of appeals, and was denied by both tribunals; and both discussed the true intent and purpose of the statute at length and in unmistakable language. The board stated: "Congress, we do not think, ever intended to do more than to relieve such importers from the loss of wastage in smelting. Congress certainly did not intend to license them to import free of duty for the market whilst the same act charged all others with the duties stated"; and the court held: "There is nothing whatever in the act to support the contention that it was designed that this particular class of importers should, to any extent, be especially privileged to put upon the markets of the United States, free of duty, a commodity which, when imported by others, was by the same act made subject to duty.

The suggestion that the long continuance of the practices detailed in the letter of the Secretary of the Treasury without objection from any of the customs officers constitutes some character of estoppel against action by the Government now to recover these duties is not tenable. *Minturn v. U. S.*, 106 U. S. 437; *U. S. v. Witten*, 143 U. S. 76; *German Bank v. U. S.*, 148 U. S. 573, 579;

U. S. v. Pine River, etc., Co., 89 Fed. 907. See also: *Hunter v. U. S.*, 5 Pet. 173, 186; *Smythe v. Fiske*, 23 Wall. 374; *U. S. v. Graham*, 110 U. S. 219; *Wisconsin Central R. R. v. U. S.*, 164 U. S. 190.

Nor have such practices been sanctioned by the Treasury Department. They may have been permitted through the ignorance or neglect of the customs officers directly in charge of this plant and, in the absence of a Government assay of the crude bullion, have not been immediately discoverable by their superior officers. But they have not been sanctioned; on the contrary, the customs regulations in force during the period in question expressly provided otherwise. It was the duty of the company to ascertain, set aside, and export the metals in the exact proportions in which they were contained in the bullion. Failing to do this, it failed to meet the conditions imposed upon it in the law, and it was not entitled to the benefits accorded by that law. The fact that the customs officials immediately in charge of the plant did not at the time detect and report these evasions, resulting in large and illegal profits to the company, is immaterial. They have been discovered now and restitution should be made.

It has been strongly argued to me by representatives of the corporation involved that the claim of the Government is barred, and various statutes of limitation have been cited. Without implying that I concur in the view of the law thus urged, it is sufficient to say on this branch of the matter that in my opinion the question presented is one to be decided by the courts and not by me.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

POSTAL SAVINGS SYSTEM—ALASKAN BANKS.

The board of trustees of the Postal Savings System may properly accept from banks organized under the laws of the Territory of Alaska security to insure the safety and prompt payment of postal deposits pursuant to the provisions of section 9 of the act of June 25, 1910 (36 Stat. 816), as amended by section 2 of the act of May 18, 1916 (39 Stat. 159).

DEPARTMENT OF JUSTICE,

October 25, 1916.

SIR: I have the honor to acknowledge receipt of your letter of September 5, 1916, wherein you ask my opinion as to whether the board of trustees of the Postal Savings System may properly accept from banks organized under the laws of the Territory of Alaska security to insure the safety and prompt payment of postal deposits pursuant to the provisions of section 9 of the act of June 25, 1910, 36 Stat. 816, as amended by section 2 of the act of May 18, 1916 (39 Stat. 159), said section, so far as here material, reading as follows:

"That postal savings funds received under the provisions of this act shall be deposited in solvent banks, whether organized under National or State laws * * * being subject to National or State supervision and examination * * *. The Board of Trustees shall take from such banks such security in public bonds or other securities supported by the taxing power as the board may prescribe, approve, and deem sufficient and necessary to insure safety and prompt payment of such deposits on demand. * * * If no such bank in any State or Territory is willing to receive such deposits on the terms prescribed, then such funds shall be deposited with the treasurer of the board of trustees * * * etc."

It is my opinion that the board may take such security from these banks.

The following additional statutes are material:

Section 416 of the Compiled Laws of Alaska of 1913 provides that the legislature—

"may * * * permit persons to associate themselves together as bodies corporate * * * for the conduct of

business of * * * banks of discount and deposit
* * * etc.”

Section 2 of the act of April 28, 1915, Alaska Laws, ch. 28, p. 70, declares—

“The term ‘banking’ within the meaning of this act shall be deemed and taken to mean the negotiation for, and the discounting of promissory notes, drafts, bills of exchange and other evidences of indebtedness, *receiving deposits*, selling and buying exchange, coin and bullion, and loaning money on personal, real, and other security, and other kindred financial operations * * *.”

Section 17-b of the act of April 28, 1915, ch. 30, p. 74, *supra*, provides:

“No bank * * * shall give preference to any depositor or creditor by pledging the assets of the bank as collateral security * * *. Any pledge, assignment or transfer of any of the assets of a bank in violation of this section shall be absolutely null and void as against the creditors of said bank.”

It will be seen from the foregoing statutes that Alaska banking corporations are “banks of deposit” and organized for the purpose, among others, of “receiving deposits.” This power to receive deposits includes all kinds of deposits—public funds as well as others—and like any other general power, carries by implication the further power to do whatever may be required as a condition of becoming entitled to have public moneys deposited with it.

Section 17-b, *supra*, was not meant as a limitation on the power to receive deposits, *i. e.*, to take deposits in the first instance. It forbids (1) the giving of a “preference” to an existing depositor or creditor by an after-pledge of bank assets, and possibly (2) the giving of its assets as collateral to secure an ordinary depositor as to whom no statute required collateral as a condition of the deposit. This distinction is pointed out in the opinion in *Commercial Banking & Trust Company, et al. v. Citizens Trust & Guaranty Company of West Virginia*, 153 Ky. 566, wherein the court says:

“Counsel for appellee also cites and relies upon Bolles on Modern Law of Banking, page 479, Morse on Banking

(4th Ed.), section 47, and Pratt's Digest of National Banking Laws, page 11, to the effect that among the implied powers of a bank is that to secure deposits. This statement of the law is not elaborated upon by any one of the authors, and we are constrained to believe and hold that the authors used this expression in its limited sense, and that it was meant to apply to that class of cases where, by express statute, a particular deposit was to be secured before it could be placed in bank. *Under such circumstances* the bank, before receiving it, would necessarily *have the right to execute the bond*, but this would not by any means, justify the claim that the bank had the right to secure other deposits, simply because it had the right to secure a particular deposit, which the law expressly required to be secured before it could be deposited (p. 575).

* * * * *

"Sound business banking principles demand that no bank should be permitted, under any circumstances, to secure any depositor by a pledge of its assets. But, where, by charter provision or statute, a bank is required to secure a State, county, court, or other deposit, before it can receive such deposit, the security which the bank gives must be such as it can procure by personal endorsement or otherwise, which does not involve a pledge of its assets. For many years the State officials have placed such a construction upon the law requiring State depositaries to give security before they can receive any part of the State's money. The assets of these State depositaries (p. 577) have never been pledged as security for State deposits, but the State has invariably received as security for the deposits the endorsement of individuals or solvent bonding companies. This is, undoubtedly, the character of security which the legislature contemplated should be given, when it enacted section 4693, Kentucky Statutes, requiring State depositaries to give security for the public funds, and sections 411 and 2903, requiring depositaries for chancery court and city funds to give security for their safekeeping and payment" (p. 578).

It should be noted that while the court held that the pledging of collateral to secure the deposit of the county treasurer was an *ultra vires* and void act on the part of the bank, it did so only because there was no statute requiring such a pledge as a condition of right to lodge or receive the deposit.

While the act of Congress first herein quoted is otherwise like the Kentucky statutes last referred to, instead of merely requiring security, *i. e.*, personal obligation, it expressly requires such security to be in "public bonds or other securities supported by the taxing power." As the Kentucky court held its statute requiring security merely conferred a power on the bank to furnish that kind of security, *i. e.*, personal indorsement, contemplated by the statute, so by like reasoning it must be held that the act of Congress, section 2, *supra*, confers a power to deposit the securities of the kind contemplated by that act, *i. e.*, bonds, etc. There being no limitation as to the ownership of the bonds there is no prohibition against the use of the bank's own assets.

It is not necessary, however, to hold that a power to deposit its own assets is conferred by section 2, *supra*, for though it but imposes a condition precedent to the right to receive the deposit, yet because of this condition the general power to receive deposits would carry the power to comply with that condition in order to gain them.

Respectfully,

T. W. GREGORY.

TO THE POSTMASTER GENERAL.

EXPROPRIATION OF LANDS IN CANAL ZONE.

Lands situated in the Canal Zone and expropriated by this Government, in pursuance of the Executive order of December 5, 1912, should be paid for according to the value they had prior to the date of our convention with Panama, and not according to their value at some other subsequent date.

The expressions of opinion of the Attorney General contained in his letter of October 13, 1913, to the Secretary of War, were intended

to be confined to the point specifically stated, i. e., to the question of improvements made by occupants of land in the Canal Zone since the date of our treaty with Panama.

DEPARTMENT OF JUSTICE,

November 25, 1916.

SIR: I am in receipt of your communication of July 10, 1916, in which you request my interpretation of a certain portion of a letter written to the Secretary of War by the Attorney General on October 13, 1913. The point now presented by you, as I understand it, is as follows:

Certain lands in the Canal Zone having been expropriated by the Government of the United States in 1912, the Joint Land Commission, created under the treaty between the United States and Panama, proclaimed February 26, 1904, has held in making its awards that "the value should be fixed as of the date of the expropriation of the lands in question," and in fixing this basis it has assumed to act in accordance with the ruling of the Attorney General contained in the above-mentioned letter of October 13, 1913. The question, therefore, is whether that opinion warrants the interpretation given to it by the Joint Land Commission in view of the fact that Article VI of the before-mentioned treaty (33 Stat. 2236) provides that—

"The appraisal of said private lands and private property and the assessment of damages to them shall be based upon their value before the date of this convention."

You state that it is the contention of the Canal authorities that the expression of opinion contained in the letter of October 13, 1913, related—

"solely to the value of improvements placed upon the land since the date of treaty and can not be considered as authority for the proposition that the commission may disregard the provisions of the treaty in respect of the unearned increment in the value of the land accruing since the date of the treaty."

I entertain the same view of the matter as do the Canal authorities. The portion of the opinion referred to clearly relates to improvements which at the date of the treaty with Panama were not in existence and which, therefore,

in the very nature of the case, could not be valued as of the time of the treaty. The question under consideration was whether such improvements should nevertheless be paid for, and it was held under the circumstances stated in the letter that they should be. The opinion there expressed, however, ought not, I think, to be extended beyond the precise subject matter which was under consideration. If it should be given the application which the Joint Land Commission apparently has given it the practical effect would be to eliminate from the treaty the provision of Article VI above quoted and to substitute therefor an entirely different rule for the assessment of damages.

By the act of Congress of August 24, 1912 (37 Stat. 560, 561), a general provision was made with reference to all land within the limits of the Canal Zone, as follows:

"SEC. 3. That the President is authorized to declare by Executive order that all land and land under water within the limits of the Canal Zone is necessary for the construction, maintenance, operation, sanitation, or protection of the Panama Canal, and to extinguish, by agreement when advisable, all claims and titles of adverse claimants and occupants. Upon failure to secure by agreement title to any such parcel of land or land under water the adverse claim or occupancy shall be disposed of and title thereto secured in the United States and compensation therefor fixed and paid *in the manner provided in the aforesaid treaty with the Republic of Panama*, or such modification of such treaty as may hereafter be made."

Under this authority President Taft, on December 5, 1912, issued the following Executive order:

"By virtue of the authority vested in me by the act of Congress entitled 'An act to provide for the opening, maintenance, protection, and operation of the Panama Canal and the sanitation and the government of the Canal Zone,' approved August 24, 1912, I hereby declare that all land and land under water within the limits of the Canal Zone are necessary for the construction, maintenance, operation, protection, and sanitation of the Panama Canal, and the chairman of the Isthmian Canal Commission is

hereby directed to take possession, on behalf of the United States, of all such land and land under water; and he may extinguish, by agreement when practicable, all claims and titles of adverse claimants to the occupancy of said land and land under water."

On March 8, 1913, the Joint Land Commission issued a general "Notice to persons having title or claim to Canal Zone lands," which was published in No. 29 of volume 6 of the Canal Record, page 240. This notice, after stating the sources from which authority to expropriate land was derived, and the commission's own powers, proceeded to declare that—

"All persons * * * having title or claim to, or interest in lands, or lands under water, situated in any part of the Canal Zone, except in the exempted area, or who have suffered damages of any kind by reason of the grants contained in the treaty, or by reason of the operations of the United States, its agents or employees, or by reason of the construction, maintenance, operation, sanitation, or protection of the said canal, shall file with the Joint Land Commission, a statement of the entire extent of their property rights and interests. Such statement should include the name, residence, and post-office address of the claimant, the amount of the claim, the location and extent of the property indicated, wherever practicable, by maps or drawings, the uses to which such property is put, and a description of the improvements which have been made thereon, and should be accompanied by a statement of the title and rights of the claimant thereto, supported by all existing documentary proof of title."

Subsequently the law officer of the Isthmian Canal Commission challenged certain awards of the Joint Land Commission on the ground that it exceeded its jurisdiction in making them. He stated his position in a series of propositions, which were transmitted by the President and the Secretary of War to the Attorney General with a request for his opinion as to their correctness.

Complying with this request, the Attorney General submitted his views in a letter to the Secretary of War dated

October 13, 1913, and it is that letter which I am now asked to interpret in part.

The fourth proposition submitted by the law officer of the Canal Commission—the only one having any bearing on the present question—was as follows:

“The Land Commission has no jurisdiction of claims based on property rights accruing since American occupancy of the zone.”

So far as can be ascertained from the files, the law officer of the Canal Commission was referring to improvements placed upon the lands, or to the cultivation of lands, by persons who had become occupants thereof subsequent to the treaty of 1904.

The Attorney General, in his letter of October 13, 1913, concurred in the view expressed by the Assistant Secretary of State in a letter to the Secretary of War, dated September 9, 1913, to the effect that the proposition above stated was not sound.

The Attorney General stated that an additional phase of the matter raised a further point, namely:

“That awards for improvements made by these occupants since the date of the treaty were beyond the jurisdiction of the commission by reason of the last clause of Article VI of the treaty which is as follows:

“The appraisal of said private lands and private property, and the assessment of damages to them, shall be based upon their value before the date of this convention.”

The Attorney General then proceeded to consider this further point, and used the following language which, it would appear from your present letter, forms a basis of the decision of the Joint Land Commission:

“No such point appears to have been made by the Government’s counsel either in the proceedings before the commission or since, nor has it been referred to the Secretary of State or discussed by him. I regard it as not well founded. The clause was enacted in 1903 and plainly had reference to property intended to be occupied by the United States immediately; and in fact the property necessary for the immediate structure of the canal was forthwith occupied and damages awarded for its value by the earlier commissions.

"Now, 10 years later, the Government has extended its occupation to other lands and it is for these recently occupied additional lands that this last commission has been making awards. It would certainly be a very harsh and unfair construction to apply the clause in question so as to withhold compensation for these improvements made during the decade when the Government was not occupying the premises for its public purposes."

As hereinbefore stated, my interpretation of these expressions is that they were intended to be confined to the point specifically stated, i. e., to the question of improvements made by occupants of land since the date of the treaty. A different interpretation would, I think, do violence to the express provisions of the treaty itself, and this, of course, could not have been intended.

We start with a plain provision of the treaty which is as clear, it seems to me, as language can make it. There is, therefore, no room for a construction that would change the literal and ordinary meaning of the words employed, unless to give them that meaning would produce a result so amazing and irrational as to force a conviction among reasonable men that some other meaning must have been intended. (*Church of the Holy Trinity v. United States*, 143 U. S. 457, 459.)

We have here no such situation. So far as I am aware, the only ground that has been suggested why a construction different from the obvious one ought to be given to the treaty provision in question is that awards for damages for property taken in 1912, based on the value of the property at the date of the treaty, would have the necessary effect of depriving the owners of their property without just compensation, to the extent to which there may have been an increase in value during the intervening years. And this it is urged would violate a fundamental principle of our Constitution and of the Constitution of Panama.

I think the argument is fallacious and that in reality no constitutional question is involved. Undoubtedly, all our governmental operations are to be exercised in subordination to constitutional requirements, but in this instance the treaty itself is the measure of the obligation of this

Government, and is the patent, as it were, by which the United States acquired its sovereignty and property rights on the Canal Zone. The very instrument which brings the rights into existence contains the provision that the United States shall pay for private property taken only the value which it had at the time the treaty was enacted. If a *measure* of compensation different from the one prescribed by the treaty is now to be applied, it would be equally reasonable to argue that the *manner* of ascertaining damages should likewise be a different one from that prescribed in the treaty, and that such damages for property taken by this Government should be assessed according to our usual constitutional method, by a jury of 12 men, instead of by a joint commission as provided in the treaty.

Another respect in which the treaty is shown to be its own measure of responsibility is illustrated by the language of Article VI immediately preceding the concluding sentence, that—

“no part of the work on said canal or the Panama Railroad or on any auxiliary works relating thereto and authorized by the terms of this treaty shall be prevented, delayed, or impeded by or pending such proceedings to ascertain such damages—”

whereas ordinarily in condemnation proceedings compensation must be ascertained and paid before the actual taking.

It is an entirely reasonable view that the persons who drafted the treaty foresaw the practical impossibility—which has since become even more apparent—of separating those elements of increased value due to the operations of this Government on the Canal Zone from those which may have resulted from other natural causes. The provision relative to the basis of appraisals in all probability was inserted in the treaty in contemplation of the very contingency which has since occurred. Especially is the difficulty and even impossibility of definitely ascertaining the separate elements of increased property values apparent when we consider the great purposes for which the treaty was entered into and the very comprehensive scope

of its provisions. Thus by Article I it is provided that "the United States guarantees and will maintain the independence of the Republic of Panama." To this provision itself may well be attributed much of that stability which is said to have been the occasion of a general rise in property values throughout the Republic.

Again, when we consider that the alternative to the construction of the Panama Canal was the undertaking of a similar project by this Government along the Nicaraguan route and the consequent probable abandonment of the work started at Panama, it is apparent that property values at Panama would in all likelihood have very materially decreased. Hence, in this view of the matter, the treaty provision in question may very well be taken as a governmental finding and determination by the two parties to the convention that the property values in question could not, in the nature of the case, increase from natural causes independent of the making of the treaty.

It is true that the letter of the Attorney General of October 13, 1913, which you have asked me to interpret, refers to the provisions of Article VI of the treaty as if the same contemplated an *immediate* taking of all the property as to which the method of appraisal is prescribed. The language used, however, was not essential to the solution of the point then before the Attorney General, and it is apparent on a further consideration of the facts that the treaty contemplated the taking of private property whenever the same should in the opinion of this Government become necessary; and, as already shown, prior to the general expropriation effected in 1912 such property was from time to time expropriated by this Government as needed. If an immediate taking of all the property had been contemplated by the treaty no question could arise concerning the date as of which the value of the property should be appraised, and therefore there would have been no occasion to insert the final sentence of Article VI.

It is an historical fact that the French Canal Co., and likewise the Panama Railroad Co., were in their condemnation proceedings obliged to pay values far in excess of

those prevailing in the case of transfers between private individuals of property of similar character. Undoubtedly our treaty with Panama was framed in view of this historical fact and with a purpose to prevent its recurrence with respect to properties condemned by the United States.

I am of the opinion, therefore, that compensation ought to be made to the private owners of property taken by this Government in pursuance of the Executive order made in 1912, according to the rule prescribed by the treaty and not otherwise. The Republic of Panama could without doubt have granted to this Government the Canal Zone free from all private rights whatsoever, and since it could do this it could likewise make its grant to the United States subject to only a qualified right in the private property owners. Such private rights of owners are indeed by the terms of Article VI itself expressly subordinated to the major grant made to the United States. Therefore, if such private owners suffer a real injury by the application of the rule of appraisal prescribed by the treaty they must, I think, have recourse to the Republic of Panama and not to this Government. Article XXI, already referred to, provides for such contingency as follows:

“The rights and privileges granted by the Republic of Panama to the United States in the preceding articles are understood to be free of all anterior debts, liens, trusts, or liabilities, or concessions, or privileges to other Governments, corporations, syndicates, or individuals, and consequently, if there should arise any claims on account of the present concessions and privileges or otherwise, the claimants shall resort to the Government of the Republic of Panama, and not to the United States, for any indemnity or compromise which may be required.”

For the reasons stated my conclusion is that lands situated in the Canal Zone and expropriated by this Government should be paid for according to the value they had prior to the date of our convention with Panama, and not according to their value at some other subsequent date.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF WAR.

WITHDRAWALS OF PUBLIC LANDS—FOREST RESERVES.

Withdrawals of public lands may be made in aid of pending legislation looking to the inclusion of such lands within existing national forests in those States in which there is a prohibition against the creation of national forests or making additions to existing national forests, except by act of Congress.

DEPARTMENT OF JUSTICE,

November 28, 1916.

SIR: By your letter dated May 12, 1916, you requested my opinion—

“As to whether withdrawals of public lands may be made in aid of pending legislation looking to the inclusion of such land within existing national forests in those States in which the creation of national forests or additions to existing national forests, except by act of Congress, are prohibited by the act of March 4, 1907 (34 Stat. 1271), which is reenacted by the withdrawal act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497).”

An opinion by the solicitor for your department reviewing the statutes involved and setting forth the arguments in favor of the power in question, was filed here on July 21, and has received careful consideration.

By the acts of March 3, 1891 (26 Stat. 1095, 1103, sec. 24), and June 4, 1897 (30 Stat. 11), the President was empowered to establish permanent forest reservations. As an incident to that power he was, impliedly, authorized, without further legislation, to withdraw land temporarily for examination with a view to its inclusion later in permanent forests, if found suitable. The forest reserve homestead act of June 11, 1906 (34 Stat. 233), refers to these temporary or preliminary withdrawals as “temporary forest reserves.” *Vide* 28 Op. 424; *Id.* 522.

The act of March 4, 1907 (34 Stat. 1256, 1271), provides:

“That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Colorado, or Wyoming, except by act of Congress.”

54 *Withdrawals of Public Lands—Forest Reserves.*

The withdrawal act of June 25, 1910 (36 Stat. 847), declares that the President at any time, in his discretion, may "temporarily withdraw * * * any of the public lands of the United States * * * and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes," and that "such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress." The third section of this act requires that the Secretary of the Interior report all such withdrawals to Congress, and the second section contains a proviso which is a literal reproduction of the language from the act of March 4, 1907, which I have already quoted. The act of August 24, 1912 (37 Stat. 497), reenacts the act of June 25, 1910, with certain changes immaterial to the matter in hand, and repeats the proviso without alteration save for the addition of California to the list of forbidden States.

What the legislation of 1907 aimed to prevent (in the States named) was the increase, by Executive action based on the acts of 1891 and 1897, *supra*, of the areas designated and set apart as national forests and administered as such pursuant to the forest reserve legislation. If such increases were to occur, that act intended that they should be brought about only by the direct action of Congress. *Pro tanto*, it worked a repeal of the acts of 1891 and 1897, *supra*. They had given the President authority to create forest reservations in these States; the act of 1907 simply took that authority away. It did not purport to interfere with the President's authority, then implied (*United States v. Midwest Oil Company*, 236 U. S. 459), and since made express (act of 1910, *supra*), to withdraw land from the operations of the general land laws in aid of proposed legislation, nor do I perceive any sound reason for inferring such an intention. The withdrawal power could not create forest reservations or add to those already created; the result of its exercise would merely be to preserve the status of the land withdrawn until Congress had determined whether to bring about the creation or addition by its own enactments.

Assuming, then, that the provision of 1907 was not intended to interfere with this general power of the President, there remains the question whether from the simple repetition in the act of 1910 of the very same language which was employed in 1907, such an intention must be imputed to Congress. Arguments may be adduced on both sides of this question. One might urge that the proviso has no place in the withdrawal act unless directed against the withdrawal power, to which it might be replied that, being a mere repetition, the proviso should be deemed to retain its original meaning, and its reiteration be explained upon the theory that Congress, desiring to adhere to the policy thus expressed in 1907, and not feeling sure how broadly the withdrawal power might be extended in interpretation, repeated the proviso out of abundant caution but without intending to alter its original scope and meaning. This latter theory, in my opinion, is the sounder, and should be followed in practice. It accords with the words of the proviso and with what was undoubtedly its meaning when first enacted; it is supported by the general purpose and the legislative history of the withdrawal act; and, finally, it resolves the doubt, as it should be resolved, in favor of the public interest. The opposite view would leave the Government without means to prevent the attachment of private interest and private claims to lands required for forest purposes, however urgent the need for reserving them, and however certain it might be that Congress reserve them if given opportunity to legislate.

Your question is therefore answered in the affirmative.

Very respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE SECRETARY OF AGRICULTURE.

56 *Leasing Public Lands Withdrawn for Irrigation.*

LEASING PUBLIC LANDS WITHDRAWN FOR IRRIGATION
PURPOSES.

The authority to lease for summer recreation purposes land around Bumping Lake withdrawn for irrigation uses but not required for the irrigation project, which land constituted part of the area previously withdrawn for the Rainier National Forest, is in the Department of Agriculture, and the rentals should be covered into the Treasury as miscellaneous receipts. But in recognition of the needs of the reclamation service, and to forestall any contracts detrimental to the reclamation project, all leases should be subject to the prior approval of the Secretary of the Interior.

DEPARTMENT OF JUSTICE,
November 28, 1916.

SIR: You have requested my opinion upon a question which has arisen in the administration of the Rainier National Forest in the State of Washington. On August 16, 1907, the Department of the Interior withdrew for irrigation purposes a strip of land around Bumping Lake 1 mile in width from the normal high-water line of the lake. The land withdrawn for irrigation purposes constituted a part of the area previously withdrawn for the National Forest by proclamation of February 20, 1893 (27 Stat. 1063). The Reclamation Service of the Interior Department has completed the construction of a storage reservoir at Bumping Lake on the lands withdrawn, by reason of which the waters of the lake have been raised so that during the time of impounding the water for storage purposes the lake extends partly over the mile-wide strip. A portion of the mile strip which is not covered by water the Reclamation Service proposes to lease, for a period of 10 years, for summer cottages, summer hotels, and other recreation uses. The land which it is proposed to lease lies 300 feet in width and three-fourths of a mile in length along the shores of the lake.

A dispute has arisen between the Forest Service of your Department and the Reclamation Service of the Department of the Interior as to which has authority to make the lease, and it is this question which has been submitted to me for opinion.

The reclamation act of June 17, 1902 (32 Stat. 388), authorizes the withdrawal of public lands for two pur-

poses, namely, first, those required for irrigation works contemplated under the provisions of the act, and, second, the withdrawal from all forms of entry, except under the homestead laws, of lands in the project believed to be susceptible of irrigation thereunder. The withdrawal for irrigation works is known as the first form of withdrawal, and it was under that provision of the statute that the withdrawal in question was made.

Section 3, of the act of 1902, which contains the authority for the withdrawal of public lands, further provides that the Secretary of the Interior "shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act."

The reclamation fund provided for in the act of 1902 consists of all moneys received from the "sale and disposal of public lands" in the States named, among them the State of Washington; including the surplus of fees and commissions and excess of allowances to registers and receivers and excepting the 5 per cent of the proceeds of the sales of public lands in the States named, which are set aside by law for educational and other purposes (sec. 1).

The subsequent legislation in regard to this fund is found in the following acts:

Act of March 3, 1905 (33 Stat. 1032), which declares that there shall be covered into the reclamation fund the proceeds of the sales of material utilized for temporary work and structures and other condemned property purchased under the reclamation act, and any moneys refunded in connection with operations under the act.

Act of April 16, 1906 (34 Stat. 116), as amended by the act of February 24, 1911 (36 Stat. 930), providing for the establishment of town sites on reclamation projects, the sale of town lots, the sale of water to municipalities, the leasing of power and power privileges in connection with the reclamation projects, the proceeds of which are to be covered into the reclamation fund.

Act of February 2, 1911 (36 Stat. 895), authorizing the sale of lands which have been acquired under the reclamation act, but are not needed for the purpose for which they

58 *Leasing Public Lands Withdrawn for Irrigation.*

were purchased—the proceeds to be covered into the reclamation fund.

The laws mentioned above constitute all of the legislation to which my attention has been called, making provision for the reclamation fund.

Prior to February 1, 1905, the forest reserves, or national forests, as they are now called, were under the control of the Secretary of the Interior, and all laws in regard to their administration were, of course, executed by him. On the date named, however, Congress passed an act (33 Stat. 628), providing for the transfer of forest reserves from the Department of the Interior to the Department of Agriculture, and imposed upon the Secretary of Agriculture the duty of executing all laws affecting public lands theretofore or thereafter reserved for forest purposes, "excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands."

By section 5 of that act it was provided that all money received from the sale of any products or the use of any land or resources of the forest reserves should be covered into the Treasury of the United States and for a period of five years should constitute a special fund, available until expended, as the Secretary of Agriculture might direct, for the protection, administration, improvement, and extension of forest reserves. By the act of March 4, 1907 (34 Stat. 1256, 1270), it is provided that all money received after July 1, 1907, by or on account of the Forest Service for timber, or from any other source of forest-reservation revenue, shall be covered into the Treasury of the United States as a miscellaneous receipt.

By the act of March 4, 1915 (38 Stat. 1086, 1101), the Secretary of Agriculture is authorized, upon such terms as he may deem proper, to permit responsible persons or associations to use and occupy suitable spaces or portions of ground in the national forests for the construction of summer homes, hotels, or other structures needed for recreation or public convenience, not exceeding 5 acres to any one person or association.

The reclamation act clearly authorizes the Secretary of the Interior to withdraw public land for the construction of irrigation works, and it has been construed to authorize a withdrawal for the purposes named of lands previously set aside for national forests. See opinion of July 3, 1915, addressed to you in regard to the administration of the Teton National Forest in Wyoming.

In that opinion it was said that a designation of forest lands by the Secretary of the Interior for immediate or prospective reclamation uses would withdraw them from the operation of the general laws which look to the acquisition of private rights or privileges within the national forests just as a similar designation of public lands would withdraw them from the operation of the laws permitting rights or privileges to be obtained in the vacant unappropriated public domain; but that it did not follow that lands might be eliminated from a national forest by a reclamation withdrawal; that preliminary withdrawals of that kind made through caution or necessity often exceeded the area ultimately required for the operation and protection of the irrigation works, and that whenever it becomes apparent that a withdrawal is in whole or in part unnecessary, it should be modified or revoked so that lands not needed for the reclamation use may be restored to the status that they formerly occupied.

Under this authority it would seem that the Secretary of the Interior must determine what lands are necessary for the purpose desired, and in the case of a reservoir, it may well be that he should control not only the area covered by water but also a reasonable area adjoining for the purpose of protecting the banks, preventing pollution of the water and other similar purposes. It seems that the debris accruing from falling timber is dangerous to the reservoir and dam; and that a certain amount of protection against storms is necessary. It is true that the determination of the Secretary of the Interior as to the extent of the land adjoining Bumping Lake necessary for irrigation purposes must be within the exercise of reasonable discretion. But on the facts submitted I can not say that the

strip of land now proposed to be leased for summer recreation purposes is not necessary for the irrigation project. The question as to necessity is a technical one to be resolved by expert engineers. Leases, if made, might well contain express provisions reserving such power of control to the Secretary of the Interior as will enable him to insure proper protection of the reservoir and its waters from injurious acts of the lessees.

This does not mean, however, that the Secretary of the Interior has power to lease forest lands thus reserved and covered the rentals into the reclamation fund. My opinion is that he has no such power. As was indicated in my opinion to you of July 3, 1915, the forest lands withdrawn for irrigation purposes should be administered by the Department of Agriculture, subject to the necessities of the reclamation use. Moreover, as has been seen, the statute of 1915 specifically grants authority to the Secretary of Agriculture to lease forest lands for summer recreation purposes.

In the present case, authority to lease the strip proposed is in the Department of Agriculture, and the rentals should be covered into the Treasury as miscellaneous receipts. But in recognition of the needs of the reclamation service, and to forestall any contracts detrimental to the reclamation project, all leases should be subject to the prior approval of the Secretary of the Interior.

Very respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE SECRETARY OF AGRICULTURE.

**TITLE TO LANDS WITHIN FORT D. A. RUSSELL TARGET
AND MANEUVER RESERVATION.**

Where lands within the Fort D. A. Russell Target and Maneuver Reservation were offered in exchange for other public lands outside the reservation, under the exchange provisions of the act of June 4, 1897 (30 Stat. 36), but the lieu selections were disapproved and cancelled by the Land Department, the full equitable title, at least, to the lands tendered in exchange, remains in the selector, and the Government has no right whatever to the possession or use of the lands tendered in exchange.

NOTE.—Opinion of November 28, 1916, relating to International Harvester Co., p. 601.

The title to base lands offered in exchange under the said act of June 4, 1897, does not pass to the Government upon the filing in the local land office of a recorded deed purporting to convey them to the United States, notwithstanding that the lieu selections are disapproved and cancelled by the Land Department.

DEPARTMENT OF JUSTICE,

November 29, 1916.

SIR: By your letter of July 15, 1916, you requested an opinion as to whether the title to certain tracts of land within the Fort D. A. Russell Target and Maneuver Reservation, Wyo., is now vested in the United States. It appears that the lands in question were originally patented to the Union Pacific Railroad Co., and by it conveyed to one C. B. Burrows. At various times in the years 1902, 1903, and 1904, the lands being then within the boundaries of a forest reserve, Burrows initiated proceedings to effect an exchange of these lands for public lands outside the forest reserve, under the exchange provisions of the act of June 4, 1897 (30 Stat. 11, 36). These provisions read as follows:

“That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.”

By the regulations of the land department under this statute the initial step looking to an exchange was the filing of an application for exchange in the local office of the land district in which the lieu lands selected were situated. The regulations required that the lands selected be described in the application and that the application be ac-

accompanied by a quitclaim deed previously recorded in the proper local recording office, and an abstract of title, etc. (24 L. D. 592-3, paragraphs 15-16). Paragraph 18 of the regulations reads:

"All applications for change of entry or settlement must be forwarded by the local officers to the Commissioner of the General Land Office for consideration, together with report as to the status of the tract applied for."

It is entirely clear that under these regulations the applications for the lands selected and the quitclaims deed of the lands offered in exchange, abstract of title, etc., were all to be filed at the same time and, when filed, constituted one record, which was to be forwarded by the local land officers to the Commissioner of the General Land Office "for consideration."

In compliance with these requirements of the land department, Burrows executed and caused to be recorded in the recording office of the proper county, his deeds purporting to convey to the United States the various tracts here involved, and thereafter filed the same, with abstracts of title, etc., in the local land office, together with his application to select other public lands in place thereof. His selections were never approved by the land department, but were finally rejected and canceled. The exchange provisions of the act of June 4, 1897, have been repealed, saving a right to persons whose selections have been held invalid for any reason not the fault of the parties making the same, to make other selections in place thereof (act of Mar. 3, 1905, 33 Stat. 1264). The papers submitted do not show upon what ground Burrows's selections were canceled, but it seems clear from the statements contained in the letter of the Secretary of the Interior to you dated June 12, 1916, that no other selections have been made.

The legal question involved therefore is whether the title to base lands offered in exchange under the statute of 1897 passes to the Government upon the filing in the local land office of a recorded deed purporting to convey them to the United States, notwithstanding that the lieu selections are disapproved and canceled by the land department. This question must be answered in the negative.

Regulations 16 and 18, above referred to, were quoted in full by the Supreme Court in *Cosmos Co. v. Gray Eagle Co.* (1908 U. S. 301, 312), and the court there said that these regulations "are reasonable and entitled to respect and obedience as valid rules and regulations." In that case it was contended that the acceptance and filing by the local land officers of the application and deed effected, of themselves, a transfer of title to the deeded lands and to the lieu lands selected. The court, however, said:

"* * * The selector has not acquired title simply because he has selected land which he claims was at the time of selection vacant land open to settlement, nor does the filing of his deed conveying the land relinquished and the abstract of title with it show necessarily that he was the owner of the land as provided for by the statute. So far as his action goes, it is an assertion on his part that he was the owner in fee simple of the land he proposed to relinquish, and that the deed conveys a fee simple title to the Government, and also that he has selected vacant land which is open to settlement, and that therefore he is entitled to a patent for such land. These assertions may or may not be true. Who is to decide?"

The court clearly holds that the commissioner is to decide; and his decision is of course subject to review by the Secretary of the Interior.

As the deed and papers relating thereto and the selection and accompanying affidavits are filed at one time and go up to the commissioner as one record, it seems clear that the statute and regulations contemplate but *one* decision, namely, a decision approving or rejecting the application; and until that decision is made neither title vests. In other words, the Government accepts the title tendered only when the selection is approved, and if there is no approval the title to the lands offered does not vest. In *Lessieur v. Price* (12 How. 59, 74), the court, speaking of an exchange of lands under the New Madrid act, said, "A concurrent vestiture of title must have occurred."

If, however, anything at all may be conceived as passing to the Government by the mere filing of the recorded deed,

it can only be the bare legal title, leaving the full equitable title in the grantor.

The land department has always held that the equitable title to the base lands does not pass until approval of the selection. *Lafayette Lewis*, 33 L. D. 43; *Maybury v. Hazletine*, 33 L. D. 501; *George Austin*, 33 L. D. 589; *C. W. Clarke*, 32 L. D. 233; *Thomas B. Walker*, 36 L. D. 495. When the selection is approved, however, the title may, by the doctrine of relation, be considered to have passed as of the date of the filing. *A. G. Strain*, 40 L. D. 108. On the rejection of an application on account of defective title to the base lands the deed will be returned to the applicant. *William E. Moses*, 33 L. D. 333.

As the lieu selections in the cases submitted by you were never approved, but were canceled, you are advised that the full equitable title, at least to the lands tendered in exchange, remains in Mr. Burrows, and the Government has no right whatever to the possession or use of the lands involved.

Very respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE SECRETARY OF WAR.

ESTATE TAX—VALUE OF NET ESTATE.

Under the estate tax provisions of the revenue act of September 8, 1916 (39 Stat. 777), the Government has no authority to require the inclusion in the gross estate, for the purpose of determining the net estate, of income earned during administration and appreciation during that period in the value of the property left by the decedent.

DEPARTMENT OF JUSTICE,
November 29, 1916.

SIR: I have the honor to acknowledge your letter of the 15th instant, in which, after referring to certain sections of the estate tax act of September 8, 1916 (39 Stat. 777), you ask my opinion as to whether the Government has authority under said act to require the inclusion in the gross estate, for the purpose of determining the net estate, of in-

come earned during administration and appreciation during that period in the value of property left by the decedent.

The relevant portions of the act are as follows:

"Sec. 201. That a tax * * * equal to the following percentages of the value of the net estate, to be determined as provided in section 203, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act * * *.

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value *at the time of his death* of all property, real or personal, tangible or intangible, wherever situated.

"(a) To the extent of the interest therein of the decedent *at the time of his death* which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate * * *.

"Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from *the value of the gross estate*—

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent on the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

"(2) An exemption of \$50,000;

* * * * *

"Sec. 205. That the executor, within 30 days after qualifying as such, or after coming into possession of any property of the decedent, whichever event first occurs, shall give written notice thereof to the collector. The executor shall also at such times and in such manner as may

be required by the regulations made under this title, file with the collector a return under oath in duplicate, setting forth (a) the value of the gross estate of the decedent at the time of his death. * * * (b) the deductions allowed under section 203; (c) the value of the net estate of decedent as defined in section 203, and (d) the tax paid or payable thereon."

Since the tax levied by this act is an estate tax, and not a tax on legacies and distributive shares, it is unnecessary to determine what answer should be given to your question if the statute were similar to the act of June 13, 1898, as construed in *Knowlton v. Moore*, 178 U. S. 41, 63-71 (See *United States v. Jones*, 236 U. S. 106; *McCoach v. Pratt*, 236 U. S. 562).

Reading the above sections of the act as a whole, it is evident that the tax is not upon the property received by the beneficiary but upon the transfer of the estate, which, of course, takes place on death; that, in analogy to the income tax, and munition tax provisions, a basis is first fixed in the "gross estate" whose value, by express terms, is determined as of the death of the testator or intestate, and that the statutory "net estate" is reached by deducting from the "gross estate," valued as of this time, certain specific items and no others. The language of section 202, fixing the basic value of the "gross estate," and of section 205 as to the return of such basic value, makes any other conclusion impossible. The provisions of section 203 providing for deductions have no bearing on the valuation of the estate but only give the proper items of credit in an account whose main debt item has been already provided for.

I therefore answer your question in the negative.

I may add that in the following cases a similar interpretation has been placed upon other statutes which were not more favorable to the claim for appreciation than is the act now under consideration. *Attorney General v. Earl of Sefton*, 11 H. L. Cas. 257; *Matter of Vassar*, 127 N. Y. 1, 8; *Matter of Davis*, 149 N. Y. 539, 547; *Matter of Westurn*, 152 N. Y. 93, 102; *Matter of Rice*, 56 App. Div. 253,

255; *In re Bruce's Est.* 59 N. Y. Supp. 1083; *Matter of Vivanti*, 138 App. Div. 281; *Hooper v. Bradford*, 178 Mass. 95; *Hartman's Case*, 70 N. J. Eq. 664, 668; *Commonwealth v. Smith*, 20 Pa. St. 100; *Commonwealth v. Freedley's Exts.* 21 Pa. St. 33, 36; *Williamson's Est.* 153 Pa. St. 508, 521.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE SECRETARY OF THE TREASURY.

"TARBERT" AND "RECEIVER" SAND AND GRAVEL BARS.

The owners of the "Tarbert" and "Receiver" sand and gravel bars in the bed of the Mississippi River are not entitled to compensation for the sand and gravel taken by the United States from these bars and used for the improvement of the navigation of the river by revetting its banks, so as to confine the waters of the river to its natural channel.

DEPARTMENT OF JUSTICE,

December 7, 1916.

SIR: I have the honor to acknowledge your letters of August 29, 1916, and October 27, 1916, with inclosures, wherein you request my opinion whether, under the facts set forth by you and hereinafter recited at length, the owners of the "Tarbert" and "Receiver" sand and gravel bars in the Mississippi River—

"* * * are entitled to compensation for the material taken by the United States from those bars and used for the improvement of the navigation of the river by revetting its banks, so as to confine the waters of the river to the natural channel of the same."

The essential facts are that "neither bar carries any soil or vegetation"; that "the water that covers these bars is the usual seasonal high water; exceptional floods merely increase the depth of overflow"; that "at the locality where gravel was dredged last season, the bar is still overflowed at a low stage of the river"; that "during the past forty-four years the bars have been overflowed about one-half of the time, the duration of overflow in each year

being variable"; that "the particular portion of the bar on which dredging is done, is overflowed for probably two-thirds of the year"; that "the bars are between the natural banks of the river and form a portion of the river's bed."

There is no escape from the conclusion of your engineer officer that these bars "form a portion of the river's bed." *Howard v. Ingersoll*, 13 How. 381, 428; *Paine Lumber Co. v. United States*, 55 Fed. 854, 865; *St. Louis, Iron Mountain & Southern R. R. Co. v. Ramsey*, 8 L. R. A. 559, 561.

It is also true that claimants' ownership of the river banks carries with it, in this particular case, ownership to the thread of the river. *Archer v. Greenville Gravel Co.*, 233 U. S. 60, 66. And such ownership, of course, would include the sand and gravel bars drawn in question. The title to the bed of the river, however, including these bars, is a qualified one; that is to say, it is always subject to the needs of navigation. The character of such title was thus comprehensively described in *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 62:

"This title of the owner of fast land upon the shore of a navigable river to the bed of the river, is at best a qualified one. It is a title which inheres in the ownership of the shore, and unless reserved or excluded by implication, passed with it as a shadow follows a substance, although capable of distinct ownership. It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the States and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress. All means having some positive relation to the end in view which are not forbidden by some other provision of the Constitution, are admissible. If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby

taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation * * *."

Such title does not permit him to stay the hand of Congress in utilizing the land for purposes of improving navigation. The injury thus suffered by the riparian owner may well be denominated as "*damnum absque injuria*." *Union Bridge Co. v. United States*, 204 U. S. 364, 390. So complete and untrammelled is the Federal power over the navigable waters that such waters have been repeatedly referred to as "the public property of the nation, and subject to all requisite legislation by Congress." *Philadelphia Co. v. Stimson*, 223 U. S. 605, 634; *South Carolina v. Georgia, et al.*, 93 U. S. 4, 10.

And, as stated in *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251, 263:

"When Congress acts, necessarily its power extends to the whole expanse of the stream, and is not dependent upon the depth or shallowness of the water. To recognize such distinction would be to limit the power when and where its exercise might be most needed. In *Scranton v. Wheeler*, 179 U. S. 141, the water was very shallow between the high land and the pier erected in the river by the authority of Congress and which it was contended cut off access to navigability."

We come then to consider some of the purposes in aid of navigation for which the so-called submerged or river bed lands of the riparian owner may be taken without making compensation to him.

In *South Carolina v. Georgia*, 93 U. S. 4, 11, 12, it was said:

"It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than another. It may build lighthouses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage."

In *Lewis Blue Point Oyster Company v. Briggs*, 229 U. S. 82, 88, it was said:

"By necessary implication from the dominant right of navigation, title to such submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require. The plaintiff in error has, therefore, no such private property right which, *when taken*, or incidentally destroyed by the dredging of a deep water channel across it, entitled him to demand compensation as a condition.

"In the *Hawkins Point Lighthouse* case, 39 Fed. 77, it was held that the occupation of the lands under navigable waters for the purpose of erecting a lighthouse thereon in aid of navigation was not a taking of private property requiring compensation, the owner's title being by necessary implication, subject to the use which the United States had made of it. In *Scranton v. Wheeler*, 57 Fed. 803, 813, 814, it appeared that the United States had erected a long dike or pier upon the submerged lands of a riparian owner on the St. Marys River, Michigan, cutting off his access to deep water. It was held that *his title was subject to whatever use the Government found appropriate for improving navigation.*"

In *Philadelphia Company v. Stimson*, 223 U. S. 605, 635, the court said:

"When the State of Pennsylvania established harbor lines and thus undertook to regulate the rights of navigation, its action, however effective as between the State and the riparian proprietors, was necessarily subject to the paramount power of Congress. The State lines can be conceded no permanent force, as against the will of Congress, without substituting for its constitutional authority the supremacy of the State with respect to navigable waters.

"It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction of navigation. *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421. And in its regulation of commerce it may establish harbor lines or limits beyond which deposits shall not

be made or structures built in the navigable waters. The principles applicable to this case have been repeatedly stated in recent decisions of this court. *Gibson v. United States*, 166 U. S. 269; *Scranton v. Wheeler*, 179 U. S. 141; *C. B. & Q. Ry. Co. v. Drainage Commissioners*, 200 U. S. 561; *West Chicago R. R. v. Chicago*, 201 U. S. 506; *Union Bridge Co. v. United States*, 204 U. S. 364; *Monongahela Bridge Co. v. United States*, 216 U. S. 177; *Hannibal Bridge Company v. United States*, 221 U. S. 194."

And in *Greenleaf Lumber Company v. Garrison*, 237 U. S. 251, 268, it was said:

"The mooring of vessels is as necessary as their movement, and the navigability of a river can be maintained or increased as legally for the accommodation of war vessels as for trading vessels, those of public ownership as well as those of private ownership, and we cannot enter into a consideration of what may be necessary for either purpose."

But the Federal power is not limited to such particular uses as those dealt with in the cases above reviewed. This is clearly pointed out in the *Greenleaf Lumber Company* case, *supra*, wherein it was said at page 268:

"It was said in *United States v. Chandler-Dunbar Water Co.*, 229 U. S., at page 64: So unfettered is the 'control of Congress over the navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to the navigation, is conclusive. Such judgment and determination is the exercise of legislative power in respect to a subject wholly within its control.' And in *Scranton v. Wheeler*, 179 U. S. 141, 162: 'Whether navigation upon waters over which Congress may exert its authority requires improvement at all, or *improvement in a particular way*, are matters wholly within its discretion; * * *'"

The adjudicated cases definitely establish (1) that the power of Congress to use navigable waters and lands under them in aid of improvement of navigation is paramount, and may be exercised without making compensation to riparian owners for any right or title they may possess in such waters or lands; and (2) that the manner in which the improvement shall be made and the form it shall take

are matters solely for the determination of the legislature. Possessing the right, as we have seen, to (1) divert the water from one channel of the river to improve the navigability of the other channel; (2) remove the soil for the purpose of deepening or widening the channel; and (3) take the land for lighthouse, dike, or jetty purposes, it inevitably follows that, unless the applicable principle is to be destroyed by an exception not heretofore recognized, the land or soil may equally be taken for the purpose of actually constructing the works above mentioned, and that would include the work in the case which you submit. *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 369. As stated in *Greenleaf Lumber Company v. Garrison*, 237 U. S. 251, 263, "to recognize such distinction would be to limit the power where its exercise might be most needed."

Were the soil in the case under consideration that usually found in river beds probably no one would deny the power of Congress to utilize it for the purpose proposed. Obviously such right is not curtailed because the soil, through action of the waters, has acquired something of commercial value. The transformation thus wrought in the soil can add nothing to the title of the riparian owner as against the power of Congress to still make such soil contribute to the needs of navigation.

As further fortifying the conclusion herein reached see 22 Op. 646; 18 *ib.* 64; and 16 *ib.* 480.

I have not overlooked the ruling in *Archer v. Greenville Gravel Company*, 233 U. S. 60, which your claimants interpret as conferring upon them a right to compensation for the proposed taking of their bars. That case, however, merely affirms the oft repeated doctrine that ownership of such lands only protects "against the acts of third parties," but "is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers." *United States v. Chandler-Dunbar Company*, 229 U. S. 53, 62.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE SECRETARY OF WAR.

AUTHORITY TO DESIGN LETTER BOXES.

The power to determine the character and quality of letter boxes for the entire postal system is vested in the Postmaster General, and the Art Commission of New York has no right to control the design of letter boxes to be erected in that city.

DEPARTMENT OF JUSTICE,

December 27, 1916.

SIR: I have the honor to acknowledge your letter of November 11, 1916, wherein you request my opinion as to whether the Art Commission of the City of New York has the right "to exercise control as to the kind of letter box to be erected in New York City." It appears from the papers you submit that the Art Commission has refused to approve the design of letter box which you desire to install.

The real question seems not so much one of the mere power to choose a design as of the fundamental power to install letter boxes in cities, for the power to install boxes necessarily carries with it the power to design the boxes.

The law under which the Art Commission assumes to act (vol. 2, Laws of New York, 130th sess., chap. 675, p. 1549—act of July 20, 1907), reads as follows:

"Hereafter no work of art shall become the property of the city of New York, by purchase, gift or otherwise, unless such work of art or a design of the same, together with the proposed location of such work of art, shall first have been submitted to and approved by the commission; nor shall such work of art until so approved be contracted for, erected or placed in or upon, or allowed to extend over or upon any street, avenue, square, common, park, public building, or other public place belonging to the city. The commission may, when they deem proper, also require a complete model of the proposed work of art to be submitted. The term "work of art" as used in this title shall apply to and include all paintings, mural decorations, stained glass, statues, bas reliefs or other sculptures; monuments, fountains, arches, or other structures of a permanent character intended for ornament or commemoration. No existing work of art in the possession of the city

shall be removed, relocated or altered in any way without the similar approval of the commission, except as provided in section six hundred and thirty-nine of this act. The commission shall act in a similar capacity, with similar powers, in respect of the designs of buildings, bridges, approaches, gates, fences, lamps or other structures erected or to be erected upon land belonging to the city, and in respect to the lines, grades and plotting of public ways and grounds and in respect of arches, bridges, structures and approaches which are the property of any corporation or private individual, and which shall extend over or upon any street, avenue, highway, park or public place belonging to the city, and said commission shall so act and its approval shall be required for every such structure which shall hereafter be erected or contracted for; except that in case of any such structure which shall hereafter be erected or contracted for at a total expense not exceeding two hundred and fifty thousand dollars, the approval of said commission shall not be required, if the mayor or the board of alderman shall request said commission not to act. But this section shall not be construed as intended to impair the power of the park board to refuse its consent to the erection or acceptance of public monuments or memorials or other works of any sort within any park, square or public place in the city."

"SEC. 2. This act shall take effect immediately."

The pertinent Federal statutes read as follows:

"Section 396, Revised Statutes. It shall be the duty of the Postmaster General:

"First. To establish and discontinue post offices.

"Second. To instruct all persons in the postal service with reference to their duties.

* * * * *

"Sixth. To control, according to law, and subject to the settlement of the Sixth Auditor, all expenses incident to the service of the department.

"Seventh. To superintend the disposal of the moneys of the department.

* * * * *

"Ninth. To superintend generally the business of the department, and execute all laws relative to the postal service.

"Section 3868 R. S.: The Postmaster-General *may establish*, in places where letter-carriers are employed, and in other *places where, in his judgment, the public convenience requires it, receiving boxes for the deposit of mail matter*, and shall cause the matter deposited therein to be collected as often as public convenience may require.

"Act of March 2, 1889, 25 Stat. 841, 844: * * * The Postmaster General may, when if in his judgment the good of the service so requires make contract for necessary supplies for the free-delivery service for a period not exceeding four years.

"Act of April 28, 1904, 33 Stat. 440: That there shall be appointed by the President, by and with the advice and consent of the Senate, a purchasing agent for the Post Office Department, who shall hold office for four years unless sooner removed by the President, and who shall receive an annual salary of four thousand dollars, give bond to the United States in such sum as the Postmaster General may determine, and report direct to the Postmaster General; and who shall, under such regulations, not inconsistent with existing law, as the Postmaster General shall prescribe, and subject to his direction and control, have supervision of the purchase of all supplies for the postal service.

"The purchasing agent, in making purchases for supplies necessary for the Post Office Department, shall advertise, as now provided by law, and award contracts for such supplies to the lowest responsible bidder in pursuance of existing law. The purchasing agent shall have recorded in a book to be kept for that purpose a true and faithful abstract of all bids made for furnishing supplies to the Post Office Department, giving the name of the party bidding, the terms of the offer, the sum to be paid, and he shall keep on file and preserve all such bids until the end of the contract term to which they relate. * * *

"Act of March 3, 1897, 29 Stat. 648: The Postmaster General shall for the fiscal year eighteen hundred and

ninety-nine, and annually thereafter, submit in the annual estimates to Congress estimates in detail as far as practicable for expenses of the free-delivery service.

"Section 3964 R. S.: The following are established post roads:

* * * * *

"All letter-carrier routes established in any city or town for the collection and delivery of mail matters."

The above scheme of legislation clearly manifests the purpose of Congress that supplies, including letter boxes, for the postal service shall (1) be standardized, and (2) that the Postmaster General shall determine the character and quality of such supplies. It would not be feasible to make four-year contracts, or meet the needs of the service within the limits of the appropriations, upon any other basis. If one municipality may exercise the right of requiring the furnishing of letter boxes made according to its specifications as to design, every other one of the approximately 1,800 letter-carrier cities may exercise a similar right, and the Postmaster General in such a situation could not submit to Congress annual estimates for the ensuing year; nor could he enter into four-year contracts. What each city might require as to design could not be definitely known until the time actually arrived for supplying such city with boxes.

As demonstrating the consequences of recognizing the right of a city to control the design of boxes, it is provided in the postal appropriation act of July 28, 1916, 39 Stat. 412, 421, that not to exceed \$6,000 "may be expended for the purchase of dies for letter boxes." You show that a single die for the design of a letter box, the adoption of which you were considering, would cost \$6,000, and that one bid fixed the price at \$7,000. Should each of the 1,800 carrier cities demand a box differing from the others, it is plain that the expenditure for dies alone would more than consume the entire above-mentioned appropriation of \$225,000, which was made not only for letter boxes, but for other equipment for city delivery service.

We thus have a direct conflict between the power exercised by Congress, through the Postmaster General, in re-

gard to letter boxes for the entire postal system and the power of control sought to be exercised by the Art Commission of New York City acting under State law.

It is unnecessary to enumerate the many instances of legislative exercise of the power to establish post offices and post roads, and to enact necessary laws incident thereto, conferred upon the Federal Congress by article 1, section 8, of the Constitution. Certainly at this late date no one will assert that the power did not cover the erection and control of street letter boxes. *Ex parte Jackson*, 96 U. S. 727, 732; *In re Rapier*, 143 U. S. 110, 134. As stated in the latter case:

“* * * When the power to establish post offices and post roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective * * *.”

In accord are *Lottery Case*, 188 U. S. 321, 350; *Public Clearing House v. Coyne*, 194 U. S. 497, 506; *Western Union Tel. Co. v. Penn. R. R. Co.*, 195 U. S. 540, 562.

The supremacy and absolute freedom from State control of the Federal Government in discharging its constitutional powers was elaborately considered and upheld nearly a century ago in *McCulloch v. Maryland*, 4 Wheat. 416, and the principles there announced have ever since been adhered to.

While the right of a State to tax a Federal agency was there in issue the following from the court's opinion makes it clear that the ruling extends with equal force to any attempted State control over such agencies (pp. 405, 406, 429, 436):

“The Government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, ‘anything in the constitution or laws of any State to the contrary notwithstanding.’

* * * * *

“The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are

employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single State can not confer a sovereignty which will extend over them.

* * * * *

“The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, *by taxation or otherwise*, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.”

The case of *Ohio v. Thomas*, 173 U. S. 276, represents an application of the above doctrine to an attempted exertion of State control not involving taxation. The State law required the posting of placards bearing the words “Oleomargarine sold and used here” in eating houses of all kinds in which that substance was sold or used, and the question for determination was whether the local law applied to the soldiers’ home, an institution under Federal supervision, it appearing that oleomargarine was served there. The following excerpt from the opinion of the court discloses, briefly, the grounds upon which it was held that the State law had no application to the home (p. 283):

“Whatever jurisdiction the State may have over the place or ground where the institution is located, it can have none to interfere with the provision made by Congress for furnishing food to the inmates of the home, nor has it power to prohibit or regulate the furnishing of any article of food which is approved by the officers of the home, by the board of managers and by Congress. Under such circumstances the police power of the State has no application.

"We mean by this statement to say that Federal officers who are discharging their duties in a State and who are engaged as this appellee was engaged in superintending the internal government and management of a Federal institution, under the lawful direction of its board of managers and with the approval of Congress, are not subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority."

In *Farmers Bank v. Minnesota*, 232 U. S. 516, 524, it appeared that the State court decision there under review was tested upon a supposed narrowing of the doctrine of *McCulloch v. Maryland*, *supra*, by certain subsequent decisions of the Supreme Court cited and analyzed. But the contention was rejected and the principle applied that any "burthen on the operations of Government," however "inconsiderable," imposed by State authority, can not be permitted.

It follows that the fundamental test is not, whether the attempted State exertion will affect the exercise of a Federal function to an extent that will demonstrably impair or impede the exercise of such function; it need only appear that the State has thereby in any degree laid its regulative hand upon such function. Only on this basis can we resolve such cases as those hereinbefore cited, and *Choctaw O. & G. R. Co. v. Harrison*, 235 U. S. 292; *Indian Ter. Illuminating Co. v. Oklahoma*, 240 U. S. 522; *Williams v. Talladega*, 226 U. S. 404.

But were the rule otherwise, if the power claimed for the State authorities were conceded, it might prove in operation, as shown above, a substantial burden upon the administration of the postal system.

I have no difficulty in reaching the conclusion that your power and discretion in this matter is not subject to the control of the Art Commission of New York City.

The papers which accompanied your letter are herewith returned.

Respectfully,

T. W. GREGORY.

TO THE POSTMASTER GENERAL.

ADVANCEMENT OF STAFF OFFICERS IN NAVY.

Advancement of staff officers in the Medical, Pay, and Construction Corps, and Corps of Civil Engineers, from captain to rear admiral may be made upon selection by the President.

Promotion of all staff officers of the Navy to higher offices may be made upon selection by the President.

DEPARTMENT OF JUSTICE,

December 27, 1916.

SIR: I have the honor to acknowledge your letter of September 12, 1916, wherein you request my opinion upon the following questions:

“(1) Whether advancement of staff officers in the Medical, Pay, and Construction Corps, and Corps of Civil Engineers, from the rank of captain to the rank of rear admiral (established by the naval appropriation act of August 29, 1916, 39 Stat. 577) may be made upon selection by the President; and,

“(2) Whether the promotion of all staff officers of the Navy to higher offices may be made upon selection by the President.”

Whether or not—as you assume in your first question—the act establishes a new *rank* of rear admiral rather than, e. g., a new *grade* of medical director, with the rank of rear admiral, your first question must be answered in the affirmative.

The second question I likewise so answer.

The particular provisions of the act to be interpreted are:

“The total number of commissioned officers of the active list of the following mentioned staff corps at any one time, exclusive of commissioned warrant officers, shall be distributed in the various grades of the respective corps as follows:

“MEDICAL CORPS. One-half *medical directors* with the rank of rear admiral to four *medical directors* with the rank of captain, to eight medical inspectors with the rank of commander, to eighty-seven and one-half in the grades below medical inspector: *Provided*, That hereafter appointees to the *grade of assistant surgeon* shall be between

the ages of twenty-one and thirty-two at the time of appointment.

"PAY CORPS. One-half *pay directors* with the rank of rear admiral to four *pay directors* with the rank of captain, to eight pay inspectors with the rank of commander, to eighty-seven and one-half in the grades below pay inspector.

"CONSTRUCTION CORPS. One-half *naval constructors* with the rank of rear admiral to eight and one-half *naval constructors* with the rank of captain, to fourteen naval constructors with the rank of commander, to seventy-seven naval constructors and assistant naval constructors with the rank below commander: *Provided*, That vacancies in the Construction Corps shall be filled in the manner now prescribed by law, at such annual rate as the Secretary of the Navy may prescribe: * * * etc.

"CORPS OF CIVIL ENGINEERS. One-half *civil engineers* with the rank of rear admiral to five and one-half *civil engineers* with the rank of captain, to fourteen *civil engineers* with the rank of commander, to eighty *civil engineers* and assistant civil engineers with the rank below commander." (Act of Aug. 29, 1916, 39 Stat. 577.)

The previous legislation was as follows:

Section 1362, Revised Statutes, provided that the active lists of *line* officers of the Navy should be divided into eleven *grades*. Subsequent legislation, including the navy personnel act of March 3, 1899, 30 Stat. 1004, reduced these grades to seven, namely, rear admiral, captain, commander, lieutenant commander, lieutenant, lieutenant (junior grade), and ensign; and the Engineer Corps, with corresponding grades, was transferred to the *line*. Sections 1368 to 1405, Revised Statutes, provided for the Medical Corps, Pay Corps, Engineer Corps (now in the line), professors of mathematics, and naval constructors. This provision is illustrated by section 1368:

"The active list of the Medical Corps of the Navy shall consist of fifteen medical directors, fifteen medical inspectors, fifty surgeons, and one hundred assistant surgeons."

Section 1458, relating to retired officers, provided that—

"The next officer in rank shall be promoted to the place of a retired officer, according to the established rules of the service; and the same rule of promotion shall be applied successively to the vacancies consequent upon the retirement of an officer."

(These "established rules of the service" required promotion by seniority.)

Sections 1466 to 1510, Revised Statutes, fixed the relative rank of naval and Army officers, as well as the relative rank of line and staff officers of the Navy, *e. g.*, "Medical director, the relative rank of captain."¹

The Revised Statutes contained no specific provision for filling grades in the Staff Corps; but by act of February 27, 1877, 19 Stat. 244, the following was added to section 1480:

"The grades established by the six preceding sections for the Staff Corps of the Navy shall be filled by appointment from the highest members in each corps, according to seniority; and new commissions shall be issued to the officers so appointed, in which the titles and grades established in said sections shall be inserted."

Section 1485 fixed precedence of officers of the Staff Corps without affecting their rank or office. Sections 1498 to 1510 provided for examinations for promotion as an additional requisite to seniority. The Navy personnel act of March 3, 1899, 30 Stat. 1004, though not otherwise affecting this prior law, extended promotion by seniority, in certain respects, to the Marine Corps.

Thus stood the law when the naval appropriation act of August 29, 1916, was enacted. This act—in addition to the provisions first above quoted—provided for a total number of line officers of the Navy, proportioned to its total enlisted strength, and divided them into different grades, as to command, precedence, privilege, or pay. officers was based on percentages of officers of the line; *e. g.*, twelve officers of the Pay Corps, for every one hundred in the line, etc. It also provides (39 Stat. 576):

"Officers of the *lower* grades of the Medical Corps, Pay Corps, Construction Corps, and Corps of Civil Engineer.s

¹ The term "relative" referring merely to precedence, was abolished by the Navy personnel act of 1899.

shall be advanced in rank up to and including the rank of *lieutenant commander* with the officers of the line with whom or next after whom they take precedence under existing law."

Finally, as to promotion, it provides (39 Stat. 578):

"Hereafter all promotions to the grades of commander, captain, and rear admiral of the *line* of the navy, * * * shall be by selection only from the next lower respective grade upon the recommendation of a board of naval officers as herein provided."

THE FIRST QUESTION.

1. While "grade" has the same meaning as "office," "rank" is merely a classification to fix the position of officers with respect to other officers in the same or in other grades, as to command, precedence, privilege, or pay. "Rank" may be conferred by mere notification, and without either examination, confirmation, or commission. *General Wood's case*, 15 Ct. Cl. 151, 159; *Wood v. United States*, 107 U. S. 414; 20 Op. 358, 362, 363; 19 Op. 169; 27 Op. 376.

So also, while "grade" is only partially, "rank" is wholly within the control of Congress. *Wood v. United States*, 107 U. S. 414, 417; Senate Rep. 2153, 58th Cong., 2d sess.

But whenever Congress creates a new grade or rank, without making any provision for filling it, the selection, in the case of a vacancy in grade, is made by the President, by and with the advice and consent of the Senate (29 Op. 117, and cases); while in the case of a vacancy in rank, it is made by the President as Commander in Chief of the Navy, without any action on the part of the Senate. *General Ainsworth's case*, 22 Op. 480.

2. Section 1480, Revised Statutes, as amended, being so limited to *grade*, can not affect advancement in rank; and because also it is limited to those grades established by sections 1474 to 1479, Revised Statutes, it can not affect advancement in the Staff Corps from captain to rear admiral.

Because the provision of the act of 1916 quoted above, relating to advancement in rank of officers of the lower

grades of certain of the Staff Corps, along with officers of the line, applies only to advancement in rank "up to and including the rank of lieutenant commander" it in turn can have no bearing upon this inquiry.

The only provision of the new act affecting advancement from captain to rear admiral does not relate to the staff but merely to "promotions to the *grades* * * * of the *line*."

Finally, the special provision as to filling vacancies in the Construction Corps—because of its reference to existing law—does not change the rule as to advancement from captain to rear admiral, in that corps.

So that neither in the new, nor in the old law is there any provision for advancement from the rank of captain to that of rear admiral in any of the various Staff Corps; and the function of selection in every such case must be exercised by the President alone under the rule announced in "I" *supra*. This disposes of the first question.

THE SECOND QUESTION.

If the statutory language first quoted herein operates merely to create a new *rank* of rear admiral within the old *grade* of "medical director", then section 1480, as amended, because in terms applicable to such *old grade*, would apply to advancement thereto from a lower grade. Such is believed to be its effect, and for these reasons:

(1) Previous Attorneys General have held with respect to the phrases corresponding to "medical director with the rank of rear admiral," that the first two words represent the *title* to the office, while the later words merely give it "*rank*," i. e., precedence, pay, command, or privilege. 10 Op. 377; 20 Op. 358; reversing 16 *ib.* 414, 417; 28 Op. 429, 526; unpublished opinion of the Attorney General of March 15, 1911, Navy Department file No. 22724-16:3.

In the last opinion it was ruled that a line captain, permanently commissioned with the rank of rear admiral, pursuant to the same law under consideration in 28 Op. 526, did not enter the *grade* of rear admiral but merely attained the rank, while continuing in the grade of captain, so that when later he was to be advanced to the grade of

rear admiral, a new examination was necessary; and on June 1, 1911, after a request for its reconsideration, that opinion was affirmed.

(2) The words "the total number of commissioned officers * * * shall be distributed in the various grades," etc., while apt for distribution among *existing* are quite inapt for the creation of *new* grades.

(3) The lumping phrase, "eighty-seven and one-half in the grades below medical inspector," forces a reference to section 1474 to learn what particular lower grades were then in existence. That the three lower grades there defined are the ones referred to is made plain by the reference in the proviso of the present act to the "grade of assistant surgeon."

(4) The last quoted words also show that the title of the grade was "assistant surgeon"; and that the added words (in section 1474) "the relative rank of master or ensign" were no part of the definition of the grade but merely a classification *within it*.

(5) In each of the sixteen different grades created by sections 1474 to 1479, inclusive, there was a separate and distinctive word title for each. Had the purpose been to create a new grade in the act of 1916, a new word title other than "medical director," such for example, as "surgeon general," would have been used.

(6) The new act makes only such specific reference to existing grades or ranks as was necessary to allot officers where an allotment peculiar to one such grade or rank was desired.

(7) Sections 1476, 1477, and 1479, Revised Statutes, not only create grades and subdivisional rank therein but also make apportionment in the grades of the Engineer Corps, naval constructors and chaplains; and a comparison of the language with that in the new act leads to the conclusion that the sole purpose of the latter was to allot officers among existing grades.

Section 1480, as amended, being applicable to advancement from grade to grade in the staff corps, it seems plain that Congress sought thereby to restrict the President to the nomination of a single person of its own choosing,

and this without regard to his comparative fitness for the larger responsibilities of the higher office. The attempt so to do is in opposition to that provision of the Constitution—section 2, Article II—requiring him to nominate, and by and with the advice and consent of the Senate to appoint.

On June 23, 1913, my immediate predecessor exhaustively examined the legal effect of a provision of the act of October 1, 1890, 26 Stat., 562, providing for promotion by seniority in the army and held (30 Op. 177), that since the Constitution cast the power and duty of selection on the President, he could not be confined in his choice to the individual senior in rank.

The opinion was supported by compelling reasoning and ample authority, and I see no cause to recede from the position thus deliberately taken. See also *Captain Haines' Case*, 29 Op. 254.

The President's power in this regard, and the Senate's check thereon, was exhaustively canvassed in the Constitutional Convention. It was at one time moved that his power be restricted to "those cases not otherwise provided for by this Constitution *or by law*." The very ground urged in support of the motion was that otherwise the President would be given too much control over the Army. The motion was decisively defeated. (Farrand, Records of the Federal Convention, Vol. II, p. 405.)

Argument is unnecessary to demonstrate how idle it would have been to have conferred the power on the President if, in practice, it might have been taken from him by statute, as would be the case if section 1480, as amended, were to be applied. Hamilton in the Federalist, No. 76; Story on the Constitution, Vol. II, sections 1526 to 1533; and Judge Cooley's note to the last section. Moreover, the alleged right to a statutory promotion could never be enforced by mandamus or injunction if the President should refuse to nominate, or the Senate should refuse to confirm the senior officer.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE NAVY.

PROMOTION OF CERTAIN LINE OFFICERS OF NAVY.

The Secretary of the Navy is required to transmit to the board of recommendation for selection for promotion of certain line officers of the Navy, provided for by the naval appropriation act of August 29, 1916 (39 Stat. 578), the entire record of such officers since their appointment to the Navy.

DEPARTMENT OF JUSTICE,

January 13, 1917.

SIR: I have the honor to acknowledge your letter of the 1st ultimo, in which you request my opinion as to whether it is your duty to transmit to the board of recommendation for selection for promotion of certain line officers of the Navy (provided for by the naval appropriation act of August 29, 1916, 39 Stat. 556, 578), the entire record of such officers since their appointment to the Navy, or merely the record in their existing grades.

With your letter you transmitted an opinion of the Judge Advocate General of the Navy, in which the conclusion is reached that you must transmit the whole record. As I agree with this conclusion, it will only be necessary for me to set out the applicable provisions of law, and state briefly my opinion as to their proper construction.

Section 1496 R. S.:

"No line officer below the grade of commodore" (now rear admiral) "and no officer not of the line, shall be promoted to a higher grade in the active list of the Navy until his mental, moral, and professional fitness to perform all his duties at sea have been established to the satisfaction of a board of examining officers appointed by the President."

Section 1498:

"Such examining board shall consist of not less than three officers, senior in rank to the officer to be examined."

Section 1499:

"Said board shall have power * * * to examine all matter on the files and records of the Navy Department relating to any officer whose case may be considered by them. * * *"

Section 1502:

"Any matter on the files and records of the Navy Department, touching each case, which may, in the opinion of the board, be necessary to assist them in making up their judgment, shall * * * be presented to the President for his approval or disapproval of the finding."

Section 1504:

"Such examining board shall report their recommendation of any officer for promotion in the following form: 'We hereby certify that _____ has the mental, moral, and professional qualifications to perform efficiently all the duties, both at sea and on shore, of the grade to which he is to be promoted, and recommend him for promotion.'"

At the time of this legislation, by long usage, confirmed by section 1458 Revised Statutes, grade promotion in the line was by seniority; i. e., the senior officer in the lower grade was as of right promoted to a vacancy in the higher grade; and the examination provided in the above statutes was merely to determine whether his fitness justified recognition of this right. The question was of the *absolute* fitness of this particular officer, not of his *relative* fitness as compared with other officers of the same grade.

"An act relative to examinations for promotions in the Navy," passed June 18, 1878 (20 Stat. 165), provided:

"That hereafter in the examination of officers in the Navy for promotion no fact which occurred prior to the last examination of the candidate whereby he was promoted, which has been inquired into and decided upon, shall be again inquired into, but such previous examination, if approved, shall be conclusive, unless such fact continuing shows the unfitness of the officer to perform all his duties at sea."

The terms of this act show that it dealt with the qualifications of a *single* officer coming up for examination for his *seniority* promotion, and not with the comparative fitness for promotion of several officers.

This being the preexisting law, the naval appropriation act of August 29, 1916 (39 Stat. 556, 578, 579), provided:

"Hereafter all promotions to the grades of commander, captain, and rear admiral of the line of the Navy * * *

shall be by selection only from the next lower respective grade upon the recommendation of a board of naval officers as herein provided.

"The board shall consist of nine rear admirals on the active list of the line of the Navy not restricted by law to the performance of shore duty only, and shall be appointed by the Secretary of the Navy and convened during the month of December of each year and as soon after the first day of the month as practicable.

"Each member of said board shall swear, or affirm, that he will, without prejudice or partiality, and *having in view solely the special fitness of officers and the efficiency of the naval service*, perform the duties imposed upon him as herein provided.

"The board *shall* be furnished by the Secretary of the Navy with the number of vacancies in the grades of rear admiral, captain, and commander to be filled during the following calendar year, including the vacancies existing at the time of the convening of the board and those that will occur by operation of law from the date of convening until the end of the next calendar year, and with the names of all officers who are eligible for consideration for selection as herein authorized, *together with the record of each officer: Provided, That any officer eligible for consideration for selection shall have the right to forward through official channels at any time not later than ten days after the convening of said board a written communication inviting attention to any matter of record in the Navy Department concerning himself which he deems important in the consideration of his case; * * ** *Provided, further, That no captains, commanders, or lieutenant commanders who shall have had less than four years' service in the grade in which he is serving on November the thirtieth of the year of the convening of the board shall be eligible for consideration by the board. * * **

"The board shall recommend for promotion a number of officers in each grade equal to the number of vacancies to be filled in the next higher grade during the following calendar year. * * *

"The report of the board * * * shall certify that the board has carefully considered the case of *every officer*

eligible for consideration under the provisions of this law, and that in the opinion of at least six of the members, the officers therein recommended are the best fitted of all those under consideration to assume the duties of the next higher grade. * * *

“* * * When the report of the board shall have been approved by the President, the officers recommended therein shall be deemed eligible for selection, and *if promoted* shall take rank with one another in accordance with their seniority in the grade from which promoted: *Provided, That any officers so selected shall prior to promotion be subject in all respects to the examinations prescribed by law for officers promoted by seniority*, and in case of failure to pass the required *professional* examination such officer shall thereafter be ineligible for selection and promotion.” * * *

The specific question is whether the act of June 18, 1878, *supra* (limiting the record to be considered by the promotion board established by section 1496 Revised Statutes), is applicable to the record which it is your duty to furnish the board provided for in the above clauses of the naval appropriation act of August 29, 1916. A comparison of all the above statutes and acts sufficiently shows its inapplicability, and, therefore, only a brief additional statement is necessary.

1. The Revised Statutes contemplated promotion by seniority. By an orderly process an officer advanced in his grade until he became senior officer. He then acquired what was called a “right” to promotion to the next grade on a vacancy. When that occurred he was examined as to his fitness to perform the duties of the next grade, and passing, he was promoted. He then proceeded by similar steps through the new grade until he became senior officer and another “right” of promotion accrued. On vacancy, another examination was taken, and, if passed, another larger step was taken. There was reason, therefore, in the provision that, *as to him*, each one of these larger steps should cut off the grade below and leave him to be judged on the next step by his conduct in the grade to which he had attained. The naval appropriation act, however, cre-

ates an entirely new system of promotion by selection, i. e., by *comparative* fitness. Officers who have four years' service in a certain grade, including two years' service at sea, are eligible for selection to the next higher grade, but the "right" is no longer individual to the senior officer to be promoted on passing an examination, but a "right" merely to have each officer's fitness impartially determined in comparison with others of his class. The considerations, therefore, which might be said to justify a limitation of the record to that of the particular grade occupied no longer apply. On the contrary, an examination of the entire record would seem to be almost essential to determine comparative fitness. This general reasoning based on a comparison of the nature of the two systems is reinforced by the special provisions of the naval appropriation act, e. g., the requirement of "the record of each officer," without limitation, and the privilege to each officer to submit to the board "*any matter of record in the Navy Department concerning himself.*"

2. The provisions of the Revised Statutes relating to the promotion board are not repealed by the naval appropriation act; on the contrary, they are continued in force, supplementary to selection in the case of promotions to the grades of commander, captain, and rear admiral, and still exclusive as to other promotions. The act of June 18, 1878, can, therefore, still have effective operation.

3. Obvious considerations of the public interest justify the same conclusion. It is well known that the provisions of the act dealing with the personnel of the Navy were passed to increase its efficiency and to make it as nearly perfect for its great purposes as possible. The oath of the recommending board is that it will perform its duties "having in view solely the special fitness of the officers *and the efficiency of the naval service.*" Evidently anything which tends to restrict the discretion of the board and to limit by formal rules the data to be examined by it would be inconsistent with the great purpose of the act.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE NAVY.

DRAWBACK ON DIAMOND NECKLACE.

Drawback should be allowed upon the exportation of a certain diamond necklace manufactured in the United States with the use of 22 imported diamonds, under Section 4, paragraph O, of the tariff act of October 3, 1913 (38 Stat. 200).

DEPARTMENT OF JUSTICE,

January 18, 1917.

SIR: I have the honor to acknowledge receipt of your letter of November 15, 1916, with inclosures, in which you request my opinion whether drawback should be allowed upon the exportation of a certain diamond necklace manufactured in the United States with the use of 22 imported diamonds. The facts as stated in the papers accompanying your letter seem to be as follows:

Twenty-two unset cut diamonds, imported into this country for sale, have been converted into a necklace, set in platinum by the importers who were unable to dispose of the loose diamonds in the United States. The value of the necklace complete is estimated at \$9,500, and the cost of the labor and material employed in setting was \$140. The importers now propose to export the necklace to the original vendor in France and have claimed a drawback of 99 per cent of the duty of 20 per cent paid on the loose diamonds upon their introduction into this country, under Section IV, paragraph O, of the tariff act of October 3, 1913 (38 Stat. 200).

You further state that:

"The facts in this and similar cases which have arisen from time to time which give rise to the question as to whether such articles are properly entitled to drawback are as follows: The jewels are billed to an American merchant either on consignment or on a long-credit agreement; the jewels are freely offered for sale in the American markets; in some instances the American merchant is unable to dispose of the jewels profitably in this country, and the same are returned to the foreign shipper, who credits the jewels to merchandise account; as the jewels have been released from the custody and control of the Government, the payment of drawback thereon, if exported in the con-

dition in which imported, would be precluded by section 3025, Revised Statutes; hence, a practice has grown up among American merchants of incorporating such jewels in rings, stickpins, necklaces, and other settings or mountings suitable to the character or value of the jewel or jewels, but at a cost which is negligible in comparison with the amount of duties involved, for the purpose of evading section 3025, Revised Statute, and obtaining a substantial refund of the duties under paragraph O, Section IV, of the tariff act of 1913.

“As stated before, the jewelry is not sold to the foreign consignee, nor does the transaction contemplate the sale of the jewels abroad in the mountings in which exported, the sole purpose of manufacture being to obtain a drawback of the duties under paragraph O, Section IV, of the tariff act of 1913, upon exportation of the jewels.”

The present drawback statute (Section IV, paragraph O, tariff act of 1913, 38 Stat. 200) provides in part:

“Upon the exportation of articles manufactured or produced in the United States by the use of imported merchandise or materials upon which customs duties have been paid, the full amount of such duties paid upon the quantity of materials used in the manufacture or production of the exported product shall be refunded as drawback, less 1 per centum of such duties.”

The admission contained in your letter that the “article falls squarely within the letter of the statute, in that imported diamonds were used, there was a process of manufacture, and a valuable article of commerce resulted,” makes it unnecessary for me to consider whether the setting of the diamonds in question in a necklace constituted an article “manufactured or produced in the United States,” a question which, under the former drawback statute, has been sometimes difficult of solution. See *Tide Water Oil Co. v. United States* (1898), 171 U. S. p. 210; *Hartranft v. Weigmann* (1887), 121 U. S. 609; *Dejonge v. Magone* (1895), 159 U. S. 562; *United States v. Dudley* (1899), 174 U. S. 670; Opinion of Attorney General Knox (1902), 23 Op. 625; and under the present statute, see Opinion of Attorney General Bonaparte (1908), 27 Op. 68.

The fact of the manufacture or production of the article in the United States being thus established, and the determination of the quantity and identity of the imported materials used therein and the duty paid thereon being proved to your satisfaction, as required in paragraph O of the statute, the only question then remaining for your determination is, in my opinion, whether there is a bona fide export of the articles in question, within the meaning of the word "export" as set forth in the opinions of the courts and in former opinions of the Attorney General rendered to you.

An inspection of the report of the examination of the importer submitted by you shows that there is an intention to make a bona fide exportation of the necklace, as that word has been used by the courts; that is, to have it enter into the commerce of a foreign country.

In my opinion, it is not incumbent upon the exporter to guarantee that the article manufactured or produced in the United States shall be sold after it is exported in the exact condition in which it is exported, nor does his right to a drawback depend upon proof that the article is intended to be sold, or will be sold, in the exact condition in which it is exported. The Secretary of the Treasury is not concerned with the future fate of the article manufactured or produced in this country, provided only that the export is a bona fide export.

The principle of the drawback statute has been frequently stated to be the building up of our export trade and the encouragement of domestic manufactures. It is clear that the manufacture or production of jewelry in this country will be encouraged by import of gems for the purpose of setting the same and by payment of drawback of duties on gems so employed in jewelry, and the export of the jewelry from this country will be equally encouraged, irrespective of the fact that the jewelry, on reaching the foreign country, may be sold as a completed work, or may be sold after being broken up into its component parts.

Nor does the fact that the manufacture or production of the article in the United States is made for the express

purpose of obtaining a drawback warrant you in withholding payment of drawback. In my opinion, the doctrine laid down in the case of *United States v. Citroen* (1912), 223 U. S. 407, p. 415, in reference to manufacture of articles for the express purpose of obtaining a lower rate of duty, applies equally well to articles manufactured for the purpose of obtaining drawback. The court said:

"When it is found that the article imported is in fact the article described in the particular paragraph of the tariff act, an effort to make it appear otherwise is simply a fraud on the revenue and can not be permitted to succeed. *Falk v. Robertson*, 127 U. S. 225, 232. But when the article imported is not the article described as dutiable at a specified rate, it does not become dutiable under the description because it has been manufactured or prepared for the express purpose of being imported at a lower rate."

Payment of drawback can not properly be made to depend on the proof of the intent of the person claiming the drawback; nor does the wording of the statute in any way warrant such requirement on the part of the Secretary.

I am of opinion, therefore, that payment of drawback should be made by you in the cases set forth in your letter.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE TREASURY.

MINNESOTA NATIONAL FOREST.

The Secretary of Agriculture may sell any timber, whether standing or down, of species other than merchantable pine, on the Minnesota National Forest outside the 10 sections and the islands and points, in conformity with the general forestry laws and regulations.

The Secretary of the Interior is authorized to sell all dead and down merchantable pine timber on these forestry lands outside the 10 sections, islands and points and not selected by the Forester for reforestation while green and standing.

The sale of all merchantable pine timber which has been selected for reforestation, as well as all timber on the 10 sections, islands and points, whether it be green or dead, standing or fallen, is under the jurisdiction of the Secretary of Agriculture.

Until the appraisal provided for in section 2 of the act of May 23, 1908 (35 Stat. 270), all moneys received from the sale of all the

timber from any of the lands within the Minnesota National Forest are required to be placed to the credit of the Chippewa Indians of Minnesota.

DEPARTMENT OF JUSTICE,

January 24, 1917.

SIR: I have the honor to respond to the request contained in your letter of August 2, 1916, for an opinion upon certain questions relating to the administration of the Minnesota National Forest.

The lands within this national forest are a portion of the lands ceded to the United States by the various tribes or bands of Chippewa Indians in Minnesota as the result of an agreement negotiated with them by a Federal commission, approved by the President March 4, 1890 (H. Ex. Doc. No. 247, 51st Cong., 1st sess.), pursuant to the act of January 14, 1889 (25 Stat. 642).

The act of 1889 declared that the cession so obtained should be "for the purposes and upon the terms in this act provided" (sec. 1). The act provided that all of the ceded lands should be classified either as "pine lands" or as "agricultural lands" (sec. 4), that the pine lands should be sold in 40-acre tracts at public auction to the highest bidder or at private sale for their appraised value (sec. 5), that the agricultural lands should be sold to homestead settlers at \$1.25 per acre (sec. 6), and that all moneys accruing from such sales, after deducting the expenses incurred in carrying out the provisions of the act, should be "placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund" to "draw interest at the rate of 5 per centum per annum" (sec. 7).

By way of amendment to the act of 1889 the act of June 27, 1902 (32 Stat. 400), provided for sale by the Secretary of the Interior of "all the merchantable pine timber, whether the same be green or dead, standing or fallen, now on such pine lands," and for sale of the cut-over pine lands as agricultural lands; all such sales of timber and land to be subject to the following provisions:

For "the purpose of reforestation" there was reserved from sale "5 per centum of the pine timber" on 200,000 acres

of the pine lands, to be selected as "forestry lands" by the Forester of the Department of Agriculture with the approval of the Secretary of the Interior, the lands so selected, upon removal of the other 95 per centum of the timber, forthwith to "become and be a part of the forest reserve," to be administered the same as other forest reserves, the Forester to "have power at all times to patrol and protect said lands and forests."

In similar manner 10 sections were required to be selected "in lots not less than 320 acres each in contiguous areas." These tracts were reserved from sale both as to the land and the timber thereon, but they were not designated as "forestry lands." The islands in Cass Lake and Leech Lake, not less than 160 acres at the extremity of Sugar Point, on Leech Lake, and Pine Point Peninsula approximating 7,000 acres, were reserved both as to land and timber "to remain as Indian land under the control of the Department of the Interior." Of the agricultural lands there were also reserved from sale those within or contiguous to the "forestry lands" not to exceed 25,000 acres to be designated by the Forester and to "become and be a part of the forest reserve." No provision was made for compensation to the Indians for the land or timber so reserved from sale.

The act of February 1, 1905 (33 Stat. 628), transferred from the Secretary of the Interior to the Secretary of Agriculture the control and administration of forest reserves.

The act of May 23, 1908 (35 Stat. 268), amending the acts of 1889 and 1902, created the Minnesota National Forest out of the "forestry lands" selected and reserved under the act of 1902, describing it by metes and bounds and also specifically including the 10 sections which had been selected by the Forester, all the islands in Cass Lake, the 160 acres at the extremity of Sugar Point, and the Pine Point Peninsula.

By section 2 of this act the Secretary of the Interior was authorized "to proceed with the sale of the merchantable pine timber upon the above described land outside of said 10 sections and said islands and points, in conformity

with" the act of 1902, "reserving 10 per centum of such timber from sale" to be designated by the Forester; "and as to the timber upon said 10 sections and said islands and points," the Forester was authorized, under rules and regulations prescribed by him "to sell and dispose of so much of the standing timber thereon as he may deem wise and advisable in the conduct of a national forest."

Following these provisions in the same section, the act required that a commission "shall at once be appointed" and "shall proceed forthwith" to appraise the value of the 5 per centum of timber reserved from sale by the act of 1902, the 10 per centum to be reserved under this act, and the timber upon said 10 sections and upon the unallotted land on said islands and points; to ascertain the acreage of the land covered by this act; and to the estimated value of the reserved timber to add an amount equal to \$1.25 for each and every such acre; and the total amount, when approved by the President, was required to be certified to the Secretary of the Treasury and placed to the credit of the Chippewa Indians in Minnesota as a part of the permanent fund of said Indians provided for in the act of 1889.

Section 5 required "that all moneys received from the sale of timber from any of the lands set aside by this act for a national forest, prior to the appraisal herein provided for, including all moneys received for timber under sales made by the Secretary of the Interior, as authorized by existing laws and section 2 of this act, shall be placed to the credit of the Chippewa Indians in the State of Minnesota," and "after said appraisal the national forest hereby created, as above described, shall be subject to all general laws and regulations from time to time governing national forests, so far as said laws and regulations may be applicable thereto."

The commission provided for in the act of 1908 has never been appointed, nor has appraisal of the reserved timber, ascertainment of acreage of the reserved land, or adjustment of the amount due the Indians for such timber and land ever been made.

A demand has arisen for certain species of timber on these forest lands other than merchantable pine. A heavy

windstorm has blown down large quantities of all species of the timber on all parts of the forest reserve, estimated at between 2,000,000 and 3,000,000 feet board measure. This down timber is deteriorating and unless sold will become a total loss.

Differences having arisen between your Department and the Interior Department respecting the jurisdiction of the departments to effect necessary sales of this down timber and desirable sales of other than pine timber, and respecting the application of the proceeds of such sales, you have submitted for my opinion the following questions, together with memoranda from the law officers of both departments:

"1. Is the Secretary of Agriculture authorized to sell standing timber, of species other than that covered by the term 'merchantable pine timber,' as used in the act of 1908, not within the ten sections, islands, or points?

"2. Is the Secretary of Agriculture, or the Secretary of the Interior, authorized to sell down 'merchantable pine timber' other than that upon the ten sections, islands, and points, or that reserved under the five and ten per cent provisions?

"3. Is the Secretary of Agriculture authorized to sell the down 'merchantable pine timber' reserved under the five and ten per cent provisions, and the down timber of any species on the ten sections, islands, and points?

"4. What disposition is to be made of the moneys received from the sale of each of the above classes of timber?"

1. So far as concerns the power of the Secretary of Agriculture to sell timber of any species or condition on any part of this national forest, there is no distinction in the act of 1908 between the lands outside and those inside the 10 sections, islands, and points, except the authority granted to the Secretary of the Interior to sell a certain percentage of the merchantable pine within the outside area. With this exception, all the lands within the national forest by its creation were placed under the jurisdiction of the Department of Agriculture (act of Feb. 1, 1905, 33 Stat. 628), and no express grant of authority to sell timber in the ordinary course of the conduct of a national forest was necessary.

The reason for the provision in section 2 authorizing the Forester "to sell and dispose of so much of the standing timber" on the 10 sections and on the islands and points "as he may deem wise and desirable in the conduct of a national forest" evidently was intended only to except this area more clearly from the authority of the Secretary of the Interior, just previously granted, to sell 90 per cent of the merchantable pine on other parts of the forest reserve. It is not, therefore, to be taken as intended to exclude the general authority of the Department of Agriculture to sell timber outside the 10 sections, islands, and points, but rather as an affirmation of such authority, which is to be taken as granted by the creation of the national forest, and from which is excepted only the percentage of merchantable pine authorized to be sold by the Secretary of the Interior.

The provision of section 5 making this forest "subject to all general laws and regulations from time to time governing national forests, so far as said laws and regulations may be applicable," after the appraisal of the timber reserved for forestry purposes, does not postpone the operation of the forestry laws and regulations, except such as relate to the application of the proceeds of timber sales. As will be more fully shown in the discussion of question 4, the sole purpose of this appraisal was to credit the Indians with the value of the reserved timber, in fulfillment of the Government's obligation under the act of 1889, after which, but not before, the forestry laws and regulations relating to the proceeds of timber sales could properly apply.

I therefore answer to the first question that the Secretary of Agriculture may sell any timber, whether standing or down, of species other than merchantable pine, on these forestry lands outside the 10 sections and the islands and points, in conformity with the general forestry laws and regulations.

2. Section 2 of the act of 1908 authorizes the Secretary of the Interior "to proceed with the sale of the merchantable pine timber" outside of the 10 sections, islands, and points, "in conformity with" the act of 1902, which act

defines such timber so authorized to be sold as "green or dead, standing or fallen."

The reservation of 5 per centum of merchantable pine by the act of 1902, increased to 10 per centum by the act of 1908, to be selected by the Forester, was for "the purpose of reforestation." This purpose obviously would exclude all dead and down timber at the time of selection by the Forester. Hence all dead and down merchantable pine, outside the 10 sections, islands, and points, and not selected by the Forester for reforestation while green and standing, is authorized to be sold only by the Secretary of the Interior. This answers the second question.

3. All merchantable pine timber which has been selected by the Forester for the purpose of reforestation, as well as all timber on the 10 sections, islands, and points, is reserved by the act of 1908 from sale by the Secretary of the Interior and placed under the jurisdiction of the Secretary of Agriculture. It is therefore subject to sale only by the latter under the forestry laws and regulations, whether it be now green or dead, standing or fallen. This disposes of the third question.

4. The act of 1889, upon the faith of which the Chippewa Indians of Minnesota ceded the lands in question to the United States, very plainly provided for the sale of all these lands together with all the timber thereon, and for the creation of a permanent interest-bearing fund out of the proceeds of such sales for the benefit of the Indians. These lands with the timber thereon so acquired by the Government were held in trust for the Indians "for the purposes and upon the terms" stated in the act of 1889. *Minnesota v. Hitchcock*, 185 U. S. 373, 394-396.

The omission of Congress in the act of 1902 to make adequate provision for compensation to the Indians for the land and timber thereby reserved from sale did not extinguish the national obligation arising from this agreement with the Indians. The act of 1908 explicitly recognizes this obligation and in precise language provides for its fulfillment. By this act the Indians are to receive \$1.25 per acre for all of the lands reserved for forestry purposes,

together with the appraised value of all timber reserved from sale, and the proceeds of all timber sold by the Secretary of the Interior at any time and by the Secretary of Agriculture prior to the appraisal. To this effect the language of the act is too plain to admit of a doubt. And if a doubt did exist it should be resolved in favor of the Indians. *Choate v. Trapp*, 224 U. S. 665, 675.

Evidently the sole object intended to be accomplished by the commission provided for in the act of 1908 was to assure full and prompt compensation to the Indians for all the land and timber reserved from sale. The commission was required to be appointed "at once" and to "proceed forthwith" to appraise the value of the reserved timber and to ascertain the acreage of the reserved land; and the total appraised value of the timber, together with the total value of the land at \$1.25 per acre, was directed to be placed to the credit of the Indians.

The delay in the appointment of this commission has already resulted in depriving the Indians of interest for eight years on the sum due them for the land and timber diverted for forestry purposes from the trust to which they were subject. Whatever reasons may exist to justify this delay, it should not be permitted to operate to the further prejudice of the Indians. As if in contemplation of just such an event, it was provided in section 5 of the act of 1908 "that all moneys received from the sale of timber from any of the lands set aside by this act for a national forest prior to the appraisal herein provided for * * * shall be placed to the credit of the Chippewa Indians in the State of Minnesota." In this there is no ambiguity. The appraisal has not been made, and until it is made "all moneys received from the sale of timber from any of the lands" in the Minnesota National Forest are required to be placed to the credit of these Indians.

Very respectfully,

T. W. GREGORY.

To the SECRETARY OF AGRICULTURE.

FEDERAL FARM LOAN ACT.

That portion of section 26 of the Federal farm loan act of July 17, 1916 (39 Stat. 380), which exempts first mortgages executed to Federal land banks and farm loan bonds from State, municipal, and local taxation, is constitutional.

DEPARTMENT OF JUSTICE,
January 30, 1917.

SIR: I have the honor to acknowledge your letter of the 26th instant, requesting my opinion as to the constitutionality of section 26 of the Federal farm loan act, approved July 17, 1916 (39 Stat. 360, 380).

Said section, after exempting from all taxation every Federal land bank, every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, except taxes upon real estate, provides as follows:

"First mortgages executed to Federal land banks, or to joint-stock land banks, and farm loan bonds issued under the provisions of this act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation."

I assume that it is the constitutionality of that portion of the section which exempts first mortgages and farm loan bonds from State, municipal, and local taxation which is in question, and I confine myself to that matter.

While there are many cases dealing with the taxation by the States of the instrumentalities of the Federal Government, it is sufficient in the present case to refer to *McCulloch v. State of Maryland*, 4 Wheat. 316, and certain cases following, and similar to, that case. In *McCulloch v. State of Maryland*, after holding that the act incorporating the Bank of the United States was constitutional, it was held that the State had no power to require a stamp tax on the circulating notes of said bank. It should be noted that these notes were not obligations of the United States nor legal tender. They were merely issued by the bank to borrowers in exchange for notes of

the borrowers discounted by the bank. The Supreme Court did not deny the power of the State of Maryland to tax the property of the bank within the State, but held that it could not tax *the operations of the bank as such*. This case was followed in *Osborn v. Bank*, 9 Wheat. 738, where it was held that the State could not levy a license tax upon the United States bank for doing business in the State.

In *Weston v. City Council of Charleston*, 2 Peters 449, it was held that the State could not tax the bonds issued by the Federal Government, even in the hands of the holder thereof.

In *Bank v. Supervisors*, 7 Wall. 26, it was held that the State could not tax the legal-tender notes of the United States.

In *Talbott v. Silver Bow County*, 139 U. S. 438, 440, it was said :

“That shares of stock in a national bank are not subject to taxation without the consent of Congress is conceded.”

Relying upon *People v. Weaver*, 100 U. S. 539, 543.

In *Farmers Bank v. Minnesota*, 232 U. S. 516, it was held that the State could not tax bonds issued by a territorial municipality. On page 526 the court said :

“But we deem it entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the Government, and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holders is, in the last analysis, to impose a tax upon the right of the municipality to issue them.”

That these views have been adhered to, if not extended, will be seen by the two most recent decisions of the Supreme Court. In *Choctaw, Oklahoma and Gulf Railroad v. Harrison*, 235 U. S. 292, it was held that the State could not levy a tax upon the proceeds of coal mined under a lease from the Indians, the court saying, page 299 :

“A tax upon a merchant’s, manufacturer’s, or miner’s gross sales is not the same thing as one on his stock treated as property. * * * The former is *upon his business*. In effect, the Oklahoma Act prescribes an occupation tax * * *; and, accepting as true the allegations of appel-

lant's bill, we think it can not lawfully be subjected thereto."

This decision was adhered to in *Indian Territory Oil Co. v. Oklahoma*, 240 U. S. 522, 529.

In addition, in *Bank v. Supervisors*, supra, at pages 30, 31, it is said that where the question as to whether the things taxed are instrumentalities of the Government or not is doubtful, a declaration by Congress that they shall be exempt from taxation by the States is practically conclusive. The court said:

"And we think it clearly within the discretion of Congress to determine whether, in view of all the circumstances attending the issue of the notes, their usefulness, as a means of carrying on the Government, would be enhanced by the exemption from taxation; and within the constitutional power of Congress, having resolved the question of usefulness affirmatively, to provide by law for such exemption."

The question, therefore, is whether a State tax upon the bonds and first mortgages contemplated by the Federal farm loan act is a tax upon the operations of the system created by the act so that such a tax may hamper it in its efficient and successful operation; or, looking at it more narrowly, whether the above question is of sufficient doubt to make the declaration of Congress that such a tax would hamper the operations of the system conclusive upon the courts.

I do not deem it necessary to analyse the act in detail. It is sufficient to say that the mortgages and farm loan bonds are of the very essence of the system created by it. The original capital of the Federal land banks is to be loaned, through the agency of national farm loan associations, to bona fide cultivators of the soil on first mortgages on farm lands. When a sufficient amount in such mortgages has accumulated, they are to be turned over to a "registrar" appointed by the farm loan board, and, with the approval of that board, farm loan bonds are issued by the land bank and sold. With the proceeds further loans are made on mortgages, which mortgages in their turn become the basis for an additional issue of bonds. This con-

tinuous flow and reflow of mortgages and bonds constitutes the prime function of the whole system.

A tax upon these bonds and mortgages would, therefore, be a tax upon the most important operations of the system, and might hamper it to so great an extent as to render it unsuccessful. In other words, it might be found impossible to raise capital by means of the bonds, and it might be found impossible to loan money on the mortgages at the reasonable rate of interest desired, if these two fundamental instrumentalities were taxed by the States. At any rate, Congress might well think so, and its declaration upon the subject is conclusive.

I have the honor to advise you, therefore, that, in my opinion, that portion of section 26 exempting the mortgages and bonds from State, municipal, and local taxation is constitutional.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE TREASURY.

VALIDITY OF PORTO RICO BONDS.

The proposed issue by Porto Rico of \$300,000 Insular loans refunding bonds, under authority of act No. 120, approved July 26, 1913, of the Legislative Assembly of Porto Rico, not being in excess of the debt limit provision of the act of Congress of April 12, 1900 (31 Stat. 86), will, provided the requirements of said act No. 120 are complied with, when duly sold, delivered, and paid for, constitute the valid obligation of the People of Porto Rico.

DEPARTMENT OF JUSTICE,

January 31, 1917.

SIR: In your letter of November 28 you requested my opinion as to the validity of an issue of bonds of the People of Porto Rico designated as follows:

"Three Hundred Thousand Dollars (\$300,000) Insular Loans Refunding Bonds, to be dated July 1, 1916, and to bear interest at the rate of four per cent per annum, under the provisions of Act No. 120, approved July 26, 1913."

The original grant of power to the People of Porto Rico to issue bonds is contained in section 38 of the act of Con-

gress approved April 12, 1900 (31 Stat. 77, 86), which reads as follows:

"* * * and where necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law to provide for expenditures authorized by law, and to protect the public credit * * *: *Provided, however,* That no public indebtedness of Porto Rico or of any municipality thereof shall be authorized or allowed in excess of seven per centum of the aggregate tax valuation of its property."

Relying upon this authorization the Legislative Assembly of Porto Rico passed act No. 120, approved July 26, 1913, for the purpose, as its title shows, of providing "a method of refunding to the insular treasury the amounts loaned by the People of Porto Rico to the municipal corporations and school boards of Porto Rico, and secured by the bonds of the said municipal corporations and school boards." This statute provided that the People of Porto Rico might issue coupon or registered gold bonds of specified denominations payable at places and at times to be determined by the Executive Council of Porto Rico (section 3); provided, however, that the aggregate amount thereof outstanding and unpaid should at no time exceed the aggregate amount of unpaid municipal corporation and school board bonds issued under the provisions of act No. 4, approved February 19, 1913, then held in the treasury of the People of Porto Rico (section 2).

The validity of act No. 120 with reference to the act of April 12, 1900, having been approved in the opinion of my predecessor rendered to you July 10, 1914, reaffirmed in my opinion of August 17, 1915 (30 Op. 428), there remain only questions relative to the specific bonds under consideration.

Your statement that this issue will not cause the bonded indebtedness of Porto Rico to exceed the 7 per cent debt limit provision of the act of April 12, 1900, disposes of any difficulty arising upon that score; and the minutes of the Executive Council of Porto Rico of October 24, 1916, disclosing that the bonds of the school board of San

Juan against which the refunding bonds under consideration are to be issued were intended to provide funds for a public purpose, concludes any contention that the refunding bonds also were not similarly so intended.

Regarding the proviso of section 2 of act No. 120, it is clear, inasmuch as the totals of both the school board and the refunding bonds are identical and are to be reduced by maturities of equivalent sums on identical days, until entirely extinguished on the same day, that no alteration has been made by the addition of these two series to the situation previously existing; and since that was found at the time of my opinion of August 17 to be legal and within the limit prescribed by section 2, it is obvious that ~~the~~ additional indebtedness will not now render it otherwise than legal. In view of the maxim that the law will, except to do equity, take no cognizance of fractions of a day (see *National Bank v. Burkhardt* (1879), 100 U. S. 686), the position taken by the attorney general of Porto Rico relative to the effect of the possibility of the payment of the refunding bonds a few hours before that of the school boards bonds has may hearty approval.

Finally, consideration of the minutes of the Executive Council of Porto Rico of October 24, 1916 (resolution, paragraph 3), discloses that this issue of refunding bonds is intended to comply in all respects with the technical requirements of section 3 of act No. 120. It is, therefore, to be presumed that the bonds when issued will be technically correct.

Other minor requirements, such as that in section 2 of act No. 120, necessitating the approval by certain officials of the school board ordinance authorizing the issuance of the school board bonds upon which the refunding bonds are based in case the latter are issued prior to the deposit of the former, being complied with, I am of the opinion that the proposed issue, when duly sold, delivered, and paid for, constitutes the valid obligation of the People of Porto Rico.

I have the honor to be, your obedient servant,

T. W. GREGORY.

To the SECRETARY OF WAR.

RURAL POST ROADS.

The four classes of roads herein specified are "rural post roads" within the meaning of section 2 of the Federal aid road act of July 11, 1916 (39 Stat. 355), and therefore funds appropriated by that act may properly be expended upon any of them.

DEPARTMENT OF JUSTICE,

March 2, 1917.

SIR: Your letter of January 16, 1917, concerning certain questions which have arisen in the administration of the act of July 11, 1916 (39 Stat. 355), entitled "An act to provide that the United States shall aid the States in the construction of rural post roads," with the inclosed memorandum on the subject by the Solicitor of the Department of Agriculture, has been received and the matters therein referred to have been given careful consideration.

The Congress has provided in section 2 of the said act as follows:

"That for the purpose of this Act the term 'rural post road' shall be construed to mean any public road over which the United States mails are or may hereafter be transported."

The questions submitted for opinion are as to whether certain specified kinds of roads fall within the scope of this definition so that funds appropriated by the act may properly be expended thereon by the Secretary of Agriculture in the manner therein provided.

The classes of such roads are as follows:

(1) An existing road, being used in substantial part only for transporting the mails, but in respect to which the facts warrant a finding by the Secretary of Agriculture that, if the aid requested be granted, there is a reasonable prospect that, throughout its entire length, it will be used for transporting the mails immediately, or within a reasonable time after being reconstructed or improved.

(2) An existing road no part of which is being used for transporting the mails, but in respect to which the facts warrant a finding by the Secretary of Agriculture that, if the aid requested be granted, there is a reasonable prospect that, throughout its entire length, it will be used for trans-

porting the mails immediately, or within a reasonable time, after being reconstructed or improved.

(3) An entirely new road in respect to which the facts warrant a finding by the Secretary of Agriculture that, if the aid requested be granted, there is a reasonable prospect that, throughout its entire length, it will be used for transporting the mails immediately, or within a reasonable time after construction.

(4) An existing road different sections of which, constituting substantially the whole road, are being used for the transportation of the mails, but which is not used for that purpose throughout its entire length, and in respect to which the facts do not warrant a finding by the Secretary of Agriculture that the unused portions, constituting an unsubstantial part of the whole, will be used for transporting the mails in the near future, but in respect to which the facts warrant a finding by the Secretary of Agriculture that it would be uneconomical to construct the parts used for carrying the mails without at the same time constructing the parts not so used.

In my opinion all four of these classes of roads are rural post roads within the intent of section 2 of the act of July 11, 1916, and therefore funds appropriated by that act may properly be expended upon any of them.

In view of the urgency of the cases pending before you for disposition, I will not delay my opinion further by stopping to set down the reasoning in support of the conclusion stated.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF AGRICULTURE.

CIVIL SERVICE—ERRONEOUS CERTIFICATION.

Where a resident of Oregon, wholly without fault on his part, was examined in Washington, D. C., and appointed to a position in the apportioned service after certification was inadvertently made by the Civil Service Commission, the disregard of the restriction as to place of examination, contained in the first proviso in section 7 of the act of July 2, 1909 (36 Stat. 3), was cured and the appointee should not now be removed from the service.

DEPARTMENT OF JUSTICE,

April 19, 1917.

SIR: I have the honor to acknowledge the receipt of your letter of March 9, in which you state substantially:

Mr. Andrew J. O'Neill was appointed January 22, 1917, as a clerk at \$1,000 per annum in the office of The Adjutant General after certification by the United States Civil Service Commission; the certification was to fill a place in the apportioned service and was erroneously made, Mr. O'Neill being ineligible for appointment to that service under the provisions of the first proviso contained in section 7 of the decennial census act approved July 2, 1909 (36 Stat. 3), which reads:

"Hereafter all examinations of applicants for positions in the government service, from any State or Territory, shall be had in the State or Territory in which such applicant resides, and no person shall be eligible for such examination or appointment unless he or she shall have been actually domiciled in such State or Territory for at least one year previous to such examination."

Mr. O'Neill claimed residence in Oregon, but took the examination in Washington, D. C., and under the provisions quoted was, of course, ineligible for examination or appointment to an apportioned position.

The Civil Service Commission has requested the War Department to change the appointment to read "temporary appointment under section 1, Rule VIII, pending certification for permanent appointment"; but The Adjutant General thinks it unjust to terminate Mr. O'Neill's appointment because of an error for which he is in no way responsible, and in addition it is not desired to lose the benefit of the training which the appointee has received.

My opinion is requested upon the question whether the appointee although not eligible for appointment, inasmuch as it was made in good faith and without error on the part of the applicant, does not present a case where your Department should decline to revoke the appointment on the ground that the statute is directory; that it is not invalid; and that the revocation of the appointment would

be in violation of the act of August 24, 1912 (37 Stat. 555), regulating removals from the classified civil service.

You inclose a letter from the Civil Service Commission, signed by its president, setting out substantially the view that the provisions of the act of July 2, 1909, first quoted, *supra*, are mandatory and that the error of the commission in making the certification does not cure the disregard of the plain mandate of the statute.

It may be remarked that it is somewhat peculiar that the proviso in section 7 of the act of July 2, 1909, which is here under consideration, is one of six provisos incorporated in that section, which is in the body of an act relating purely to the taking of the thirteenth and subsequent decennial censuses, and that no other portion of the act has any relation to anything except census matters. However, it was held by Attorney General Wickersham in an opinion (27 Op. 546, 553) to be the only one of the six provisos which had general application to the apportioned service and that the other five related solely to appointments in the census service.

It is interesting to note, too, that in an opinion rendered November 15, 1909 (28 Op. 78, 82), Attorney General Wickersham felt constrained to reconsider his first interpretation of the proviso and to arrive at the conclusion that it applied only to the examinations for the apportioned service of the Government at Washington and in the Census Bureau, and that on June 17, 1910 (28 Op. 348, 352), he held that a person in the apportioned census service whose employment had terminated, although residing in a distant State, might take a new examination and receive a new appointment in the city of Washington in the apportioned service, saying (*ib. p. 352*):

"I have not overlooked the fact that the last proviso to section 7 provides that upon the termination of the services of the temporary census force the officers and employees therein 'shall not be eligible to appointment or transfer into the classified service of the Government by virtue of their examination or appointment under this act.' But Mrs. Sell is not seeking to be appointed or transferred into the classified service by virtue of her examina-

tion or appointment under the census act. She must take a new examination and receive a new appointment. The only question is where she shall take it. *To require her to return to Minnesota for the purpose, when she might take it here, is utterly useless, from the standpoint of the purpose of the law, since her status as a legal resident of Minnesota is settled.*"

If the applicant in this case was *bona fide* and actually domiciled in the State of Oregon for at least one year previous to taking the examination for the apportioned civil service in the city of Washington, D. C., I am unable to distinguish between his case and that of the applicant in the opinion last cited, who, it is true, had theretofore held a temporary appointment in the census service from the State of Minnesota, of which she was a legal resident, which had terminated, and which the statute distinctly provided conferred no civil service status on her.

The question here involved as to whether the proviso under consideration is directory or mandatory seems to have been thoroughly settled in an opinion rendered by Attorney General Harmon January 9, 1896 (21 Op. 289), in a case wherein the applicant took the examination at St. Louis, Mo., and was placed sixth on the eligible list and was not accordingly entitled to certification under the existing rules of the Civil Service Commission. He was, however, inadvertently certified and received first a probational and then an absolute appointment in the apportioned service before it was discovered that he was not eligible. Notwithstanding the civil-service act authorized the President to promulgate the rule which was violated and which consequently had the force of law after its promulgation and the act itself provided that positions in the classified service "shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations," Attorney General Harmon said (ib., pp. 290, 291):

"There must be some point of time when the mere irregularities in certification must be regarded as cured. The civil-service rules have no greater dignity than the law which authorizes them, and it would be highly unreason-

able that persons who have left other employments should be ousted from positions which they are satisfactorily filling simply because it is discovered that employees of the Civil Service Commission have made mistakes in their certifications. To hold that the irregularity in the present case has been cured by the probational and absolute appointments of Mr. Moore and by his long service is in line with the decisions of the courts upon cognate questions and with the opinion of Attorney General Miller in 20 Opinions, 274, in which it was held that an appointment made contrary to the rule of apportionment enjoined by the statute should not be disturbed because the violation of the rule had been due to mere inadvertence, though the fault was that of the appointee in failing to give notice of a change of residence which occurred between his examination and his appointment. I therefore answer that the appointment should now be considered conclusive."

On December 10, 1891, in a case in which an applicant was appointed to the civil service upon certification from the Wisconsin eligible register and his appointment charged to the apportionment of that State, although he was examined in Minnesota, it was discovered after the appointment had become absolute that the applicant had given his actual *bona fide* residence as Idaho instead of Wisconsin. Construing that section of the civil-service law which provides that appointment to the public service in the departments at Washington shall be apportioned among the several States, Territories, and the District of Columbia upon the basis of population, as ascertained at the last preceding census, Attorney General Miller said (20 Op. 276):

"But while it is the undoubted duty of the executive branch of the Government to give proper effect to this requirement of Congress, it is a very different thing to say that an appointment made in disregard of this rule of apportionment, *through a mere inadvertence*, is to fail entirely and be treated as a nullity.

"Is it reasonable to suppose that Congress was so distrustful of the executive department as to legislate with such an intention?

"It is true that a failure to obey the statute with regard to apportionment may produce inconvenience and, perhaps, hardship, but these may and will be repaired by a return to the rule of the statute in making subsequent appointments, and the presumption is not to be tolerated that any officer having the appointing power would fail to do this so soon as practicable.

"It seems to me, therefore, more reasonable to conclude that Congress did not intend that, in such a case as the one before me, where everything was done in good faith, an inadvertent disregard of the rule of apportionment in making an appointment should annul that appointment. I am of opinion, therefore, that the statute is directory only in the above particular; and, consequently, that the appointment of Mr. Hall was not invalid."

In view of the expressions quoted from the opinions of Attorneys General Harmon and Miller, in my opinion, under the peculiar circumstances of this case, where the applicant is wholly without fault and the certification was made through the inadvertence of the Civil Service Commission, disregard of the proviso of section 7 of the act of July 2, 1909, first quoted, was cured and the appointee should not now be removed from the service.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF WAR.

INSTALLATION OF METERS AT FRUIT DISTILLERIES.

Under section 402, paragraph g, of the revenue act of September 8, 1916 (39 Stat. 787), the Commissioner of Internal Revenue is authorized, by proper rules and regulations, to be approved by the Secretary of the Treasury, to adopt and prescribe for use at fruit distilleries meters, locks and seals, to be purchased at the expense of the distiller, before such distiller may legally engage in the business of manufacturing distilled spirits from fruits.

DEPARTMENT OF JUSTICE,

May 3, 1917.

SIR: Your communication of the 19th ultimo requesting an opinion as to the authority of the Commissioner of

Internal Revenue to require the installation of meters at the expense of fruit distillers under the provisions of chapter 463, section 402, paragraph (g) of the act approved September 8, 1916 (39 Stat. 787), received.

Replying thereto, I beg to advise as follows:

I find that Congress has previously dealt with this question. By an act approved July 20, 1868 (15 Stat. 125), the Commissioner of Internal Revenue, for the purpose of detecting and preventing fraud, was authorized to adopt and prescribe meters for the use of distillers.

By the express terms of the statute, the meters so adopted and prescribed were to be paid for by the distillers.

The statute is interpreted and sustained in *Tice v. U. S.*, 13 Ct. Clms. 112; 11 Ct. Clms. 538; 102 U. S. 269.

It appears that the use of meters was discontinued and the act authorizing such use was repealed by an act approved June 6, 1872 (17 Stat. 239).

The paragraph in the act to which you direct my attention reads as follows:

"(g). That the Commissioner of Internal Revenue, by regulations to be approved by the Secretary of the Treasury, may require the use at each fruit distillery of such spirit meters, and such locks and seals to be affixed to fermenters, tanks, or other vessels and to such pipe connections as may in his judgment be necessary or expedient."

No appropriation was made by Congress for the purpose of providing meters, locks and seals, and from the language of the act and the omission of Congress to expressly provide funds to defray the expense of purchasing and installing meters, locks and seals, I am of opinion that Congress intended to delegate to the Commissioner of Internal Revenue the power to require the owner of each fruit distillery, at his own expense and as part of the necessary equipment of his distillery, to furnish and install for use such meters, locks and seals, as may be adopted by the Commissioner of Internal Revenue.

Congress has the right to prescribe the conditions under which spirituous liquors may be distilled, and the condi-

tions so prescribed are conditions precedent and must be strictly complied with before the business of distilling spirituous liquors may be legally engaged in.

Under the provisions of the above designated statute, the Commissioner of Internal Revenue is authorized, by proper rules and regulations, to be approved by the Secretary of the Treasury, to adopt and prescribe for use at fruit distilleries meters, locks and seals, to be purchased at the expense of the distiller, before such distiller may legally engage in the business of manufacturing distilled spirits from fruits.

I deem it unnecessary to answer the inquiry contained in your letter with respect to the legality of the application for a certain patent and the novelty of the invention therein described, as the Bureau of Internal Revenue in your Department, for the use of which the opinion is requested, has informed me that since the request was forwarded all questions with respect to the said patent have been decided in favor of the applicant, as evidenced by the fact that the letters patent have been issued by the Commissioner of Patents.

This much is said, however, without meaning to convey the impression that an examination of the files of the Patent Office and report upon a pending application for patent or the expression of an opinion with respect to the same, could properly be brought within the line of investigations enjoined upon the Attorney General, or that the rendering of an opinion with regard to the validity or infringement of patents is within the list of subjects upon which an official opinion could with propriety be delivered.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE TREASURY.

JUDGE IN VIRGIN ISLANDS.

The President may nominate a naval officer for the position of judge in the Virgin Islands.

DEPARTMENT OF JUSTICE,

May 26, 1917

SIR: I have the honor to acknowledge the receipt of your communication of May 1, 1917, in which you ask for an expression of my opinion on the question whether an officer of the Marine Corps on the active list, is eligible for appointment by the President, as judge in the Virgin Islands of the United States, recently acquired by treaty with Denmark.

The only restriction on the power to appoint a naval officer to such a position, which could be in any way deemed to be applicable, is section 1860 of the Revised Statutes, as amended by the act of March 3, 1883, (chap. 134, 22 Stat. 567) which provides:

“At all subsequent elections, however, in any Territory hereafter organized by Congress, as well as at all elections in Territories already organized, the qualifications of voters and of holding office shall be such as may be prescribed by the legislative assembly of each Territory; subject, nevertheless, to the following restrictions on the power of the legislative assembly, namely:

“First. The right of suffrage and of holding office shall be exercised only by citizens of the United States above the age of twenty-one years, and by those above that age who have declared on oath, before a competent court of record, their intention to become such, and have taken an oath to support the Constitution and Government of the United States.

“Second. There shall be no denial of the elective franchise or of holding office to a citizen on account of race, color, or previous condition of servitude.

“Third. No officer, soldier, seaman, mariner, or other person in the Army or Navy, or attached to troops in the service of the United States, shall be allowed to vote in any Territory, by reason of being on service therein, unless such Territory is, and has been for the period of six months, his permanent domicile.

"Fourth. No person belonging to the Army or Navy shall be elected to or hold any civil office or appointment in any Territory, except officers of the Army on the retired list."

Section 1891 of the Revised Statutes is as follows:

"The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States."

It will be observed that in the former section Congress is dealing with organized Territories, or those hereafter organized, therefore the statute would not apply to a mere possession, for which there has been no organic act. The other provision quoted seems to strengthen this conclusion, since it only makes the laws of the United States effective in the organized Territories, and there is no statute extending such laws to insular possessions. Under existing law the prohibition in the latter part of section 1860 is not applicable to the Virgin Islands. It was said in *Hawaii v. Mankichi* (1903) 190 U. S. 197, 215, "The laws of the United States were not extended over the islands until the organic act was passed on April 30, 1900 * * * * *". The court decided in *Rasmussen v. United States* (1905) 197 U. S. 516 that the Constitution and laws of the United States not locally inapplicable are in full force and effect in Alaska, which, however, was on the ground that it was an incorporated Territory.

Attorney General Knox, in an opinion of February 19, 1902 (23 Op. 634, 636), said:

"As for the Philippine Islands, I do not regard them as completely organized Territories in contemplation of Revised Statutes, section 1881. The general course of governmental legislation and action concerning them seems to me to indicate that Congress and the Executive have taken the same view of them."

The reference to section 1881 was evidently intended to be 1891 *supra*.

As the islands in question are neither organized nor incorporated Territory, I am of the opinion that section 1860

supra, does not preclude the President from nominating a naval officer for the position of judge therein.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE NAVY.

NATIONAL BANK AT SCHOFIELD BARRACKS.

A national bank can be chartered at Schofield Barracks, Territory of Hawaii, with a capital of \$100,000, consistently with the provisions of section 5138 of the Revised Statutes.

DEPARTMENT OF JUSTICE,

June 5, 1917.

SIR: I have your letter dated the 27th ultimo, requesting an opinion as to whether, consistently with section 5138 of the Revised Statutes, a national bank can be chartered at Schofield Barracks, Territory of Hawaii, with a capital of \$100,000.

Section 5138, as amended (31 Stat. 48), reads as follows:

"No association shall be organized with a less capital than one hundred thousand dollars, except that banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants, and except that banks with a capital of not less than twenty-five thousand dollars may, with the sanction of the Secretary of the Treasury, be organized in any place the population of which does not exceed three thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than two hundred thousand dollars."

Schofield Barracks is a place within the boundaries of a municipal corporation known as "the city and county of Honolulu," which consists of the island of Oahu, containing some 600 square miles, and many outlying islands, some of them separated from the island of Oahu by 1,100 miles of water. The city of Honolulu proper is the seat

of this municipal corporation. Schofield Barracks is 21 miles from the city of Honolulu proper and is not a part of it except in the sense that both places fall within the boundaries of the municipal corporation known as "the city and county of Honolulu." The intervening territory is either devoted to agriculture or is uncultivated, practically devoid of improvements, and is very thinly populated.

While the population of the entire "city and county of Honolulu" according to the census of 1910 is 82,028, the population of Schofield Barracks is approximately only 8,000.

Unless, therefore, "the city and county of Honolulu," which embraces Schofield Barracks, is a city within the meaning of the last sentence of section 5138, there is nothing to prevent the organization of a national bank at Schofield Barracks with a capital of \$100,000.

I am of the opinion that it would be a *reductio ad absurdum* to say that a political subdivision of the character of "the city and county of Honolulu" is a "city" within the meaning of this provision of law. The name itself, "the city and county of Honolulu," indicates that the lawmaker had in mind an entity differing from a city in the common acceptance of the term. But even had the law called this political subdivision a city, the name given to it would not necessarily make it such within the meaning of the Revised Statutes.

It follows that a national bank can be chartered at Schofield Barracks with a capital of \$100,000.

This opinion is not to be taken as overruling the opinion of Attorney General McReynolds of June 6, 1913, 30 Op. 173. In the first place, there are differences between the two cases. In the second place, that opinion expressly recognizes that there might be "anomalous cases" to which its reasoning would not apply, and if there be "an anomalous case" it would seem to be the present one.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE TREASURY.

SALE OF FARM LOAN BONDS.

The proposed contract between the Federal Farm Loan Board and certain investment houses, in stipulating that all issues of bonds of the Federal land banks for a period of six months from June 1, 1917, shall bear interest at the rate of $4\frac{1}{2}$ per cent, is not in conflict with the second subsection of section 12 of the Federal Farm Loan Act (39 Stat. 370), which provides that farm land mortgages shall carry "a charge on the loan at a rate not exceeding the interest rate in the last series of farm loan bonds issued by the land bank making the loan."

The provision of this contract to the effect that the bonds issued by the Federal land banks and not disposed of to the investment houses shall be sold by the issuing banks at the fixed price of $101\frac{1}{4}$ is within the purview of the powers conferred by the Federal Farm Loan Act,

DEPARTMENT OF JUSTICE,

June 7, 1917.

SIR: I have the honor to reply to your letter of June 1, 1917, with inclosures, in reference to the questions raised by the Solicitor of the Treasury in regard to the validity of a proposed agreement between the Federal Farm Loan Board and certain investment houses for the sale of bonds of the Federal land banks.

These questions are, in substance—

"(1) Whether the contract, in stipulating that all issues of bonds of the Federal land banks for a period of six months from June 1, 1917, shall bear interest at $4\frac{1}{2}$ per cent, is in conflict with subsection 2 of section 12 of the Farm Loan Act which provides that farm land mortgages shall carry, "First, a charge on the loan at a rate not exceeding the interest rate in the last series of farm loan bonds issued by the land bank making the loan," the suggestion being that this provision contemplates that the discretion of the board to fix the interest rate on each separate issue of bonds shall be preserved unimpaired; and

"(2) Whether the contract, in providing that the bonds issued by the land banks and not disposed of to the investment houses shall be sold by the respective banks issuing them at the fixed price of $101\frac{1}{4}$, offends public policy by preventing sales between that figure and par and so precluding the banks from performing a public duty in case

the bonds shall prove marketable only at some figure below 101 $\frac{1}{8}$."

In my opinion both these questions are to be answered in the negative. Underlying them, of course, although not expressly formulated in the papers submitted to me, is the basic question whether the proposed contract is within the purview of the express and implied powers conferred by the Farm Loan Act. (39 Stat. 360.)

One of the evident purposes of that act is the creation of an adequate market for farm loan bonds. This is expressed in the title in the words "to create standard forms of investment based upon farm mortgage, to equalize rates of interest upon farm loans." Given this broad purpose and the express power vested in the land banks to issue farm loan bonds on conditions and terms to be prescribed by the Farm Loan Board, and to sell the same, it would seem that a large discretion must necessarily be vested in the banks and the board in arriving at a workable system of marketing the bonds, and that therefore any contract which they deem reasonably adapted to this end would be lawful unless it should run counter to some definite provision of law. I can not see that the contract now proposed does so in respect to the points raised by the Solicitor of the Treasury.

The language of subsection 2 of section 12 of the act, referred to by him as contemplating that the board must at all times preserve an unimpaired discretion to reduce the interest rate on any given issue of farm loan bonds, seems to me to have no reference whatever to the power or discretion of the board in fixing the rate of interest on bonds, but rather to be intended merely as a limitation on the interest chargeable on mortgage loans made by the farm loan banks by reference to a fact ascertainable when the loans are made, namely, the rate on the last issue of bonds of the lending bank.

The suggestion that the proposed contract ousts the land banks from the performance of a duty to the public through the provision by which they are precluded from selling their bonds at any price less than 101 $\frac{1}{8}$ for a period

of six months from June 1, 1917, loses sight of the facts (1) that the contingency that the bonds will be salable only between par and $101\frac{1}{2}$ is purely problematical and according to the farm loan commissioner remote, (2) that there is no fixed public duty upon the banks to sell bonds between par and $101\frac{1}{2}$ if they do not deem it expedient to do so, and (3) that the contract itself makes provision for the issuance, at the discretion of the board, of bonds at a higher rate of interest, and therefore presumably more marketable, in case the $4\frac{1}{2}$ per cent bonds referred to in the contract do not prove salable at $101\frac{1}{2}$. While the granting of the higher rate is made contingent upon the application by the investment houses in case they shall find the $4\frac{1}{2}$ per cent bonds unmarketable at the price stipulated, indirectly the remedy is equally available to the banks, since it may be fairly assumed that if the investment houses can market $4\frac{1}{2}$ per cent bonds at $101\frac{1}{2}$ the farm loan banks can do likewise, and, conversely, that if the banks are unable to do so the investment houses also will be unable to sell them at $101\frac{1}{2}$ and so will naturally request bonds bearing a higher rate of interest. The contract thus very reasonably contemplates that actual experience in the sale of the bonds shall be made a criterion in determining the rate of interest. At the same time the power of the board is preserved to increase it or not, as may be deemed expedient, for the contract expressly provides:

“If the board shall deem it inexpedient to advance the rate and the investment houses shall be of the opinion that the bonds can not be sold without such advance, this contract may be terminated by either party, and the board and the banks shall then be at liberty to sell bonds free of the operation of this contract.”

I repeat, therefore, that in my opinion the provision of the contract to the effect that the bonds issued by the land banks and not disposed of to the investment houses shall be sold by the issuing banks at the fixed price of $101\frac{1}{2}$ is within the powers conferred by the act.

Very respectfully,

T. W. GREGORY.

To the SECRETARY OF THE TREASURY.

TAX ON LIBERTY LOAN BONDS.

Liberty loan bonds, issued under the act of April 24, 1917 (40 Stat. 35), are subject to income tax when received by a stockholder of a corporation in payment of a corporate dividend.

A corporation owning these bonds is not to that extent exempt from excise taxes, franchise taxes, and other corporation taxes of the Federal and State Governments when such taxes are laid upon the value of the exercise of corporate privileges.

DEPARTMENT OF JUSTICE,

June 8, 1917.

SIR: Pursuant to section 356 of the Revised Statutes you ask my opinion upon the following questions arising under the administration of your department:

"1. Whether the stockholders of a corporation receiving a dividend declared payable and distributable in bonds issued under the act of Congress approved April 24, 1917, will have to pay an income tax.

"2. Whether a corporation owning these bonds would be to that extent exempt from excise taxes, franchise taxes, and other corporation taxes of the United States and of the several States."

I am of opinion that an affirmative answer must be returned to the first question and a negative answer to the second.

The act of April 24, 1917 (40 Stat. 35, 37), provides as to the bonds thereby authorized that "the principal and interest thereof * * * shall be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes, imposed by authority of the United States, or its possessions, or by any State or local taxing authority."

Like every exemption from taxation, this provision must be literally construed and can not be extended beyond its precise terms. It protects an owner of these bonds from any tax of whatever character, except estate or inheritance taxes levied upon them by reason of his possession and ownership; but a tax levied upon one's net income or annual gain can not be evaded because the income or gain happens to be liquidated by the delivery of a certain number of these bonds or other nontaxable securities. Such a tax is upon the income itself as an entirety and not upon the spe-

cific articles into which this income is finally transmuted. When these bonds, therefore, are used as a medium of payment, whether in the discharge of a private debt or a corporate dividend, the profit or gain to the recipient is nevertheless subject to income tax.

Similar principles control in answering your second question. I assume that in speaking of "excise taxes, franchise taxes, and other corporation taxes" you refer to those taxes which are laid, not upon the property of a corporation by reason of possession or ownership, but upon the value of the exercise of corporate privileges—a value which may be measured by the size of its annual income, the amount of its capital stock, or such other standard of measurement as the taxing power may select.

Such a tax, for instance, was the special excise tax upon corporations under the act of August 5, 1909, 36 Stat. 11, 112, discussed by the Supreme Court of the United States in the case of *Flint v. Stone Tracy Company*, 220 U. S. 107, in which the court said:

"It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed" (p. 165).

The special excise tax levied upon corporations by the act of September 8, 1916, 39 Stat. 756, 789, and measured by the fair value of their capital stock, is a tax of the same general character, imposed with respect to the carrying on or doing business by such corporations, and the rule laid down in the case of *Flint v. Stone Tracy Company* applies equally to it. Quoting again from that decision:

" * * * The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property" (p. 163).

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE TREASURY.

MONEY BENEFITS UNDER SECTION 4756 REVISED
STATUTES.

The Secretary of the Navy has exclusive jurisdiction to determine who are entitled to the money benefits granted by section 4756 of the Revised Statutes and, after that official has issued a certificate allowing same, the Commissioner of Pensions in making payment of said money benefits acts only in a ministerial capacity.

The question propounded by the Secretary of the Interior as to whether the payments provided for under section 4756 of the Revised Statutes are within the purview of the term "pensions" as used in the act of June 30, 1914 (38 Stat. 398), pertains rather to the administration of the Navy Department than of the Department of the Interior, and as the Secretary of the Navy has not requested an opinion with respect to this question, the Attorney General is precluded by the settled rule of his Department from expressing an opinion in regard to it.

DEPARTMENT OF JUSTICE,

June 12, 1917.

SIRS: I have the honor to acknowledge the receipt of your respective communications of May 1, 1917, and April 30, 1917, in which the Secretary of the Navy submits the question whether the Commissioner of Pensions has authority to withhold payments on account of disabled seamen and others under section 4756 Revised Statutes, when certificate allowing the same has been issued by the Secretary of the Navy, and in which the Secretary of the Interior presents the question whether the money benefits provided for in that section are within the purview of the term "pensions" as used in the act of June 30, 1914 (Chap. 130, 38 Stat. 392, 398).

The Secretary of the Navy states in his letter that—

“The offer of this department to ‘join’ with the Secretary of the Interior in submitting the question of jurisdiction to you for opinion was based upon the uniform ruling of your Department that it is without authority, under section 356, Revised Statutes, to render an opinion upon any question except when requested by the head of the Department in which such question is pending (e. g., 20 Op. Atty. Gen. 178), and contemplated following the precedents which exist for a joint submission to you in cases where the question of jurisdiction as between two or more departments is in doubt, (e. g., 29 Op. Atty. Gen. 303; id. 494).”

The passage quoted accords with the well-defined policy and practice heretofore prevailing in this department, and as a question of jurisdiction between the Navy Department and the Department of the Interior is thus squarely presented, it must be disposed of before proceeding to the question propounded by the Secretary of the Interior.

Section 4756, as amended by the act of December 23, 1886 (24 Stat. 353), provides:

“There shall be paid out of the naval pension fund to every person who, from age or infirmity, is disabled from sea service, but who has served as an enlisted person or as an appointed petty officer, or both, in the Navy or Marine Corps for the period of twenty years, and not been discharged for misconduct, in lieu of being provided with a home in the Naval Asylum, Philadelphia, if he so elects, a sum equal to one-half the pay of his rating at the time he was discharged, to be paid to him quarterly, under the direction of the Commissioner of Pensions; and applications for such pension shall be made to the Secretary of the Navy, who, upon being satisfied that the applicant comes within the provisions of this section, shall certify the same to the Commissioner of Pensions, and such certificate shall be his warrant for making payment as herein authorized.”

The question to be determined is whether the Secretary of the Navy or the Secretary of the Interior has exclusive jurisdiction to determine whether an applicant comes

within the provisions of the law and is therefore entitled to such "pension." It will be observed that the latter part of section 4756, after providing that applications for such pension shall be made to the Secretary of the Navy, says that that official, after being satisfied that the applicant comes within the law, "shall certify the same to the Commissioner of Pensions, and such certificate shall be his warrant for making payment as herein authorized." It is self-evident that if the law confers such jurisdiction upon the Secretary of the Navy, the duty of making the payments, after that Secretary has exercised his discretion in the matter, necessarily becomes ministerial in its nature.

The point involved seems to have been considered on numerous occasions by the Interior Department and, while I shall not attempt to review various rulings on the subject, it may be proper to call attention to the decision of the Interior Department of February 12, 1902 (12 P. D. 166), where other decisions under section 4756 are reviewed, and where it was held that (p. 173):

"Application for said money benefits under both of said sections (Rev. Stat. secs. 4756 and 4757) must be made to the Secretary of the Navy, and he, and he alone, is charged with the duty, directly in the first instance and through a board of naval officers in the other, of determining who are entitled to receive the same, the amount to be received, and the length of time said money benefits are to be enjoyed by those he has found to be entitled to receive them under the provisions of the law. * * * It is clear from the language of the law that the Commissioner of Pensions is simply and solely the authorized medium through and by whom the money benefits provided by said sections are to be transmitted to the persons who have been decided by the Secretary of the Navy to be entitled thereto, and that he occupies no other relation to, and is vested by the law with no other authority over, said money benefits, and that no other duty, save that of payment of the money benefits as provided in said sections, is imposed upon him."

In *Davidson v. United States*, 21 Ct. Cls. 298, 300, it was held, by a unanimous court, that the Secretary of the Navy

had exclusive jurisdiction to determine the facts and law under the section now under consideration, as indicated by the following excerpt:

"If this court were authorized to review the action of the Secretary in the premises we might possibly find good reason for concurring in his decision, but section 4756 seems to confer upon that officer exclusive jurisdiction to determine the facts and decide the law. The application is to be made to him; he is to become satisfied that it comes within the provisions of the statute; and his certificate is to be the warrant upon which the pension shall be paid by the Commissioner of Pensions."

To the same effect is the opinion of Acting Attorney General Hoyt, 25 Op. 85, 88, where it was said:

"Applications are to be made to the Secretary of the Navy, who is made sole judge of the merit of the claims, and his finding, if favorable, is certified to the Commissioner of Pensions, who then makes the payments thus authorized. The duty of the Commissioner of Pensions under these sections is purely ministerial and differs from the wide discretion which he exercises under general pension provisions."

The foregoing authorities, and others that might be cited, hold that the Commissioner of Pensions acts in a ministerial capacity in making the payments duly authorized, that he is in no way responsible for the correctness of such rulings, and therefore it is immaterial whether he concurs or differs in such judgments as may be arrived at by the Secretary of the Navy. Similarly, in a case involving matters committed by law to the decision of the Secretary of the Treasury, the Supreme Court in *United States v. Johnston*, 124 U. S. 236, 252, quoting with approval from an earlier decision, said:

"The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments."

Answering the question submitted by the Secretary of the Navy, I am therefore of the opinion that section 4756 au-

thorizes him to determine whether the applicant is entitled to the payments therein referred to, that the Commissioner of Pensions in making such payments acts only in a ministerial capacity, and that the act of June 30, 1914, referred to in the letters from each of you, has no bearing whatever on the question of jurisdiction.

Having reached the conclusion just stated, it would seem that the question propounded by the Secretary of the Interior, namely, whether the payments provided for under section 4756, Revised Statutes, are within the purview of the term "pensions" as used in the act of June 30, 1914, becomes one which pertains rather to the administration of the Navy Department than of the Department of the Interior, and with respect to it the Secretary of the Navy has not requested my opinion, but on the contrary has expressly stated that he has decided the matter and is in no doubt as to the correctness of his decision. Unless, therefore, the question actually does arise in the Department of the Interior in some manner otherwise than is now disclosed by the papers submitted, I feel precluded by the settled rule hereinbefore referred to from expressing an opinion in regard to it.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE NAVY.

To the SECRETARY OF THE INTERIOR.

LEGALITY OF BOND ISSUE OF ILOILO, P. I.

The proposed issue of \$250,000 bonds by the municipality of Iloilo, P. I., under the authority of the act of March 9, 1917, of the Philippine Legislature (assuming that the issue is necessary to anticipate taxes and is within the debt limit provisions of the act of Congress of August 29, 1916 (39 Stat. 545), will be, when made in accordance with the provisions of said act of the Philippine Legislature, a valid and binding obligation.

DEPARTMENT OF JUSTICE,

June 21, 1917.

SIR: In your letters of March 22 and May 8 last you request my opinion as to the legality of a proposed issue of

bonds by the municipality of Iloilo, P. I., in the sum of \$250,000 under authority of an act of the Philippine Legislature approved March 9, 1917.

On May 25, 1911, Attorney General Wickersham held that a certain issue of bonds by the municipality of Cebu, P. I., under authority of an act of the Philippine Legislature enacted December 27, 1910, would, when issued in accordance with the provisions of said act, be valid and binding obligations (29 Op. 102). I have compared the act authorizing the issue of bonds by Iloilo with that applying to Cebu, and I find them in all material respects the same. It is not necessary, therefore, for me to do more than refer to said opinion.

It is true that, at the time the bonds of the municipality of Cebu were issued, the organic law of the Philippines was contained in the act of July 1, 1902 (32 Stat. 691), as amended by the act of February 6, 1905 (33 Stat. 689), while at present it is contained in these acts and in the act of August 29, 1916 (39 Stat. 545), to provide a more autonomous government for the islands; and that section 11 of the latter act (evidently copied from section 38 of the Porto Rican organic act, 31 Stat. 86) contains slightly different language on the subject of the issuance of bonds by municipalities. Whereas section 66 of the act of July 1, 1902, provided that the government of the Philippines might "permit" a municipality to incur an indebtedness and the amended section in the act of February 6, 1905, provided that the government of the Philippines might "authorize" a municipality to incur such indebtedness, the act of August 29, 1916, provides that bonds "may be issued * * * by any provincial or municipal government * * * as may be provided by law." This change of language does not, however, in my judgment, alter the case. Section 12 vests general legislative powers in the Philippine Legislature, and it is well settled that a municipality is but an organ of the State, and subject in all important respects to the action of the legislature thereof. *Barnes v. Dist. of Col.*, 91 U. S. 540, 544; *Meriwether v. Garrett*, 102 U. S. 472, 511; *Atkin v. Kansas*, 191 U. S. 207, 220, 221. Hence the Philippine Legislature has the

power under the provisions of sections 11 and 12 of the act of August 29, 1916, to regulate the issuance of bonds by a municipality, as it did by the act of March 9, 1917, and may provide for action by the municipality or not as it sees proper (see the acts of the Legislative Assembly of Porto Rico construed in 29 Op. 468).

I have the honor, therefore, to advise you that, assuming, as I must, that the bonds of the municipality of Iloilo will be issued under a necessity to anticipate taxes, and that their issuance will not cause the indebtedness of the municipality to exceed 7 per cent of the aggregate tax valuation of its property at any one time; assuming also that the issuance of the said bonds will not cause the entire indebtedness of the Philippine government created by the authority conferred under the act of August 29, 1916, to exceed the sum of \$15,000,000, they will be, when issued in accordance with the provisions of the act of the Philippine Legislature, valid and binding obligations.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF WAR.

STATUS OF ARMY FIELD CLERKS.

Army field clerks may be appointed by The Adjutant General, without respect to the rules and regulations of the Civil Service Commission, and from the date of their appointment they are solely within the control of the Rules and Articles of War and not subject to the rules and regulations of the Civil Service Commission.

DEPARTMENT OF JUSTICE,

June 21, 1917.

SIRS: I have the honor to acknowledge the receipt, by reference from the President, of your request for an opinion upon the question propounded by you in your letter of February 20, 1917, viz:

"Does the provision of the Army appropriation act, approved August 29, 1916 (39 Stats. 625), that hereafter headquarters clerks shall be known as Army field clerks, have the effect of immediately removing such clerks from the competitive classified service by making them subject

to the Rules and Articles of War from the date of the passage of the act, or is it only after service of the length and character described that such clerks become subject to the Rules and Articles of War and cease to be subject to the provisions of the civil service act, rules, and regulations?"

In examining the provisions for the pay of the class of clerks referred to in the above question, it was found that the Army appropriation act, approved April 27, 1914 (38 Stat. 355), contained a general provision for the pay of "clerks, messengers, and laborers at headquarters of the several territorial departments, territorial districts, tactical divisions and brigades, service schools, and *Office of the Chief of Staff*."

After enumerating the various clerks and employees, with the salaries attached to each position, the act provided as follows:

"That on and after July first, nineteen hundred and fourteen, the pay of clerks and messengers at headquarters of territorial departments, tactical divisions, brigades, and service schools, who are citizens of the United States, shall be increased \$200 each per annum while serving in the Philippine Islands, such service to be computed from the date of departure from the continental limits of the United States to the date of return thereto. * * *

The Army appropriation act approved March 4, 1915 (38 Stat. 1067), contained a provision for appropriations for clerks under precisely the same subtitle and also contained an identical provision as to the \$200 extra pay while serving in the Philippine Islands.

The instant act, approved August 29, 1916 (39 Stat. 625), contained provisions, first, for "clerks, messengers, and laborers, office of the Chief of Staff," and, second, for "clerks and messengers for headquarters of the several territorial departments, districts, divisions and brigades, and service schools."

There was no provision in this act for an additional compensation of \$200 during service in the Philippines, which had been contained in the two previous appropriation acts. The act, however, contained the following new provisions:

"Hereafter headquarters clerks shall be known as Army

field clerks and shall receive pay at the rates herein provided, and after twelve years of service, at least three years of which shall have been on detached duty away from permanent station, or on duty beyond the continental limits of the United States, or both, shall receive the same allowances, except retirement, as heretofore allowed by law to pay clerks, Quartermaster Corps, and shall be subject to the Rules and Articles of War.

"Hereafter not to exceed two hundred clerks, Quartermaster Corps, who shall have had twelve years of service, at least three years of which shall have been on detached duty away from permanent station, or on duty beyond the continental limits of the United States, or both, shall be known as field clerks, Quartermaster Corps, and shall receive the same allowances, except retirement, as heretofore allowed by law to pay clerks, Quartermaster Corps, and shall be subject to the Rules and Articles of War."

It may be noted that by the new method of appropriation the clerks, messengers, and laborers of the office of the Chief of Staff, which is located in Washington, were separated as a class from the clerks and messengers for headquarters of the several territorial departments, districts, etc. It is apparent, therefore, that it was the intention of the Congress to discriminate between the two classes of employees with respect especially to their geographical location and to provide additional emoluments and privileges for clerks, etc., whose duties required them to be on detached duty away from a permanent station.

It is the contention of the Civil Service Commission that the military status of Army field clerks does not attach until after 12 years of service, three years of which shall have been on detached duty away from a permanent station or on duty beyond the continental limits of the United States, or both. The Civil Service Commission cites in its memorandum a circular of October 26, 1916, claimed to have the approval of the Judge Advocate General, which states as to the field clerks, Quartermaster Corps, that the act "does not remove them from their present status in regard to the operation of the civil service rules where not in conflict with the above provision of law." The Judge

Advocate General, in his memorandum under date of March 15, 1917, disclaims this circular as erroneous and states that it was issued without reference to his office. He further states that said circular No. 21 was promptly revoked by a circular No. 24 under date of December 28, 1916, in which it is stated positively that the said field clerks of the Quartermaster Corps are placed in the military service and that when appointed as field clerks, Quartermaster Corps, they are excluded from the operation of the civil service law and rules.

It appears further from the correspondence that the duties of the field clerks of the Quartermaster Corps are, as stated by the Quartermaster General, as follows:

"The duties of field clerks, Quartermaster Corps, as well as other quartermaster clerks, involve familiarity with Army Regulations; money, subsistence, and property accountability; railroad and other transportation; civil service rules, contracts, and furnishing of all kinds of supplies, record, etc."

while the duties of the Army field clerks, as defined by The Adjutant General, are as follows:

"Army field clerks are required to accompany military forces in the field; and serve under the same physical conditions and surroundings as do officers and enlisted men of the Army. They perform the necessary clerical work connected with the headquarters of military forces and of the several military departments, districts, divisions, and brigades, and service schools at which they are on duty.

"For the proper performance of their duties Army field clerks are required to have a general knowledge of military matters; channels of communication; the proper preparation and verification of various Army returns; rolls and reports; the preparation and issuance of Army orders and, of those clerks assigned to duty in the offices of the department inspectors there is required, also, the ability to check up the financial accounts of Army officers in connection with inspections, etc."

It is apparent that the duties are different. The Army field clerks are serving under the same physical conditions and surroundings as the enlisted men, and their duties, as

described, involve essentially military functions. The duties of the field clerks of the Quartermaster Corps appear to be more civilian in character. The difference in the duties is sufficient to account for the difference in the provisions of the statute applying to the two classes of field clerks.

In my opinion, the phraseology of the act recognizes that Army field clerks would necessarily attain a military status from the date of their appointment and hence be subject at once to the Rules and Articles of War and without the purview of the rules and regulations of the Civil Service Commission, while as to the field clerks of the Quartermaster Corps, Congress evidently deemed it advisable that some prior proper clerical experience should be required, i. e., "twelve years of service," before they should become subject to the Rules and Articles of War.

I concur in the opinion of the Judge Advocate General as follows:

"The act of August 29, 1916, giving headquarters clerks the status of Army field clerks contains four clauses connected together with the conjunctive "and" between each, as follows:

"(a) 'Hereafter headquarters clerks shall be known as Army field clerks,'

"(b) 'and shall receive pay at the rates herein provided,'

"(c) 'and after twelve years of service, at least three years of which shall have been on detached duty away from permanent station, or on duty beyond the continental limits of the United States, or both, shall receive the same allowances except retirement, as heretofore allowed by law to pay clerks, Quartermaster Corps,'

"(d) 'and shall be subject to the Rules and Articles of War.'

"I can not agree with the commission in regarding clause (d) as limited in its application to the clerks described in clause (c), as I think it is clear that clause (d) relates back to clause (a) and makes *all* headquarters clerks subject to the Rules and Articles of War. Congress was legislating with respect to the entire class of headquarters clerks, changing the name of the class to Army field clerks. Clauses

(b) and (c) divide the clerks into two classes with respect to compensation, but clause (d), as stated above, applies to the entire class. This view is supported by the consideration it could not have been in the contemplation of Congress in dealing with such an important matter as discipline to divide these clerks into two classes, placing a part of them under the Rules and Articles of War and leaving the other part engaged under similar conditions in the same kind of work subject to civil service discipline. Indeed, it is not believed there could be any good reason assigned for such an unusual distinction, and the great confusion in the administration and discipline of these clerks which would result from such a division of them is a strong argument against the construction contended for by the commission."

I am of the opinion, therefore, that Army field clerks may be appointed by The Adjutant General, without respect to the rules and regulations of the Civil Service Commission, and that from the date of their appointment they are solely within the control of the Rules and Articles of War and not subject to the rules and regulations of the Civil Service Commission.

Respectfully,

T. W. GREGORY.

To the UNITED STATES CIVIL SERVICE COMMISSION.

WAGES OF CANAL ZONE EMPLOYEES.

It would be legal for the Panama Canal authorities to revise the scale of wages in effect on the Isthmus so that the same should be based on the wages of civilian employees of the naval establishments in the continental United States after the latter have received the benefit of the increases provided in the naval appropriation act of March 4, 1917 (39 Stat. 1195).

DEPARTMENT OF JUSTICE,

June 28, 1917.

SIR: I have the honor to acknowledge the receipt of your letter of June 25, 1917, requesting the opinion of this Department as to whether it would be legal for the Panama Canal authorities to revise the scale of wages in effect on

the Isthmus so as to base the wages of its employees on those of civilian employees of the naval establishments in continental United States, including the increase to the latter employees provided for in the naval appropriation act approved March 4, 1917.

It appears that under section 4 of the Panama Canal Act approved August 24, 1912 (37 Stat. 560, 561), it is provided as follows:

"All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same, but salaries or compensation fixed hereunder by the President shall in no instance exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States."

I am informed that, acting under the authority therein conferred, the existing wages on the Canal Zone made effective on March 1, 1917, were based upon the wages effective in the navy yards and other Government establishments which went into effect on January 1, 1917.

The naval appropriation act approved March 4, 1917 (39 Stat. 1195), provides as follows:

"That during the fiscal year nineteen hundred and eighteen all civilian employees in the Naval Establishment, including on the lump-sum rolls only those persons who are carried thereon at the close of the fiscal year ending June thirtieth, nineteen hundred and seventeen, shall receive increased compensation at the rate of ten per centum per annum to such employees who receive salaries or wages in such establishment at the rate per annum of less than \$1,200, and increased compensation at the rate of five per centum per annum to such employees who receive salaries or wages in such establishment at a rate of not more than \$1,800 per annum: *And provided*, That so much as may be necessary for such purpose is hereby appropriated out of

any moneys in the Treasury not otherwise appropriated: *Provided further*, That in computing said ten per centum and five per centum increases of salaries, the specific increases of salaries made in this Act shall be included as a part of such increase."

The Panama Canal employees are paid from appropriations provided in the sundry civil bill. The sundry civil bill (40 Stat. 180), contains the following provision:

"SEC. 2. That to provide, during the fiscal year nineteen hundred and eighteen, for increased compensation at the rate of ten per centum per annum to employees who receive salaries at a rate per annum less than \$1,200, and for increased compensation at the rate of five per centum per annum to employees who receive salaries at a rate not more than \$1,800 per annum and not less than \$1,200 per annum, so much as may be necessary is appropriated: *Provided*, That this section shall only apply to the employees who are appropriated for in this Act specifically and under lump sums or whose employment is authorized herein, but shall not include employees of the Panama Canal on the Canal Zone: * * *

Your question, therefore, is whether, in view of the provisions of these two appropriation bills and of the Panama Canal Act prescribing the manner in which salaries or compensations may be fixed for employees in the Canal Zone, it would be proper for you now to make for such employees a readjustment of the scale of wages which took effect on March 1, 1917, so as to make the rate of compensation a sum 25 per cent larger than the compensation paid to the same class of employees in the continental United States after the latter have received the increases above mentioned.

It appears to me that, in the Panama Canal Act, the Congress recognized that the scale of wages for employees in the Canal Zone must be necessarily more or less elastic and varied to suit the changing conditions of employment there as well as in the continental United States. And realizing that climatic conditions were different and that the employment there might be considered less desirable than employment in the continental United States, it au-

thorized the President or his duly constituted authority to offer, by way of inducement to secure or to retain employees for the Canal Zone, such additional sum over the prevailing rate of wages for the same class of employees in the continental United States, not to exceed 25 per cent, as might be necessary.

It has, therefore, as your letter indicates, been necessary from time to time to adjust the scale of wages of Canal Zone employees to suit the changing conditions in the continental United States.

In my opinion, therefore, the inhibition contained in the sundry civil bill, as above set forth, as to the 10 per cent increase upon salaries of employees of the Panama Canal on the Canal Zone was not intended by the Congress to interfere with the normal operations of the provisions of the Panama Canal Act with respect to the fixation of salaries for employees on the Canal Zone.

The provisions of the sundry civil bill, so far as they apply to employees on the Panama Canal Zone, were, in my opinion, intended merely to exclude any automatic 10 per cent or 5 per cent raise of the salaries now paid to such employees; but were not intended to affect or in any way to repeal the full powers of the President to fix and revise, at any time, the general scale of wages, if, in his opinion, conditions required such action, as provided in the Panama Canal Act.

It is, therefore, my opinion that it would be legal for the Panama Canal authorities to revise the scale of wages in effect on the Isthmus so that the same should be based on the wages of civilian employees of the naval establishments in the continental United States after the latter have received the benefit of the increases provided in the naval appropriation bill.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF WAR.

PROMOTION OF NAVAL OFFICERS.

Under the act of May 22, 1917 (40 Stat. 86), the promotion board may consider for promotion captains, commanders, and lieutenant commanders who shall have served four years in their present grades on November 30 of the year of the convening of the board, notwithstanding that at the time of such consideration they have not served four years in their present grades.

DEPARTMENT OF JUSTICE,

July 14, 1917.

SIR: I duly received your letter of the 6th ultimo submitting a question as to the length of time which captains, commanders, and lieutenant commanders must have served in their present grades before they can be considered for promotion.

The act of August 29, 1916 (39 Stat. 578), provides that all promotions to the grades of commander, captain, and rear admiral of the line of the Navy—

“shall be by selection only from the next lower respective grade upon the recommendation of a board of naval officers as herein provided.”

The act then provides as follows:

“The board shall consist of nine rear admirals * * * and shall be appointed by the Secretary of the Navy and convened during the month of December of each year and as soon after the first day of the month as practicable.

* * * * *

“*Provided further*, That no captains, commanders, or lieutenant commanders who shall have had less than four years' service in the grade in which he is serving on November the thirtieth of the year of the convening of the board shall be eligible for consideration by the board * * *.”

The act of May 22, 1917 (40 Stat. 86), modified the act of August 29, 1916, by providing that—

“the Board of Rear Admirals for selection for promotion prescribed in said act [the act of Aug. 29, 1916] may be convened at such times as the exigencies of the service may require and shall recommend for promotion such number of officers as the Secretary of the Navy may pre-

scribe to fill vacancies in the several grades as provided by existing law."

The specific question is, Whether the promotion board, which is shortly to be convened under the authority of the act of May 22, 1917, can consider for promotion captains, commanders, and lieutenant commanders who at that time shall not have served four years in their present grade, but who will have done so by November 30 next.

Applying the canon of construction that "a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended" (*Blair v. Chicago*, 201 U. S. 400, 475), the effect of the provision quoted from the act of May 22, 1917, was to amend the act of August 29, 1916, so as to make it read as follows:

"The board shall consist of nine rear admirals * * * and shall be appointed by the Secretary of the Navy and convened ~~during the month of December of each year and as soon after the first day of the month as practicable at such times as the exigencies of the service may require~~ * * *

* * *
 "Provided further, That no captains, commanders, or lieutenant commanders who shall have less than four years' service in the grade in which he is serving on November the thirtieth of the year of the convening of the board shall be eligible for consideration by the board * * *."¹

Thus read, captains, commanders, and lieutenant commanders who will have served four years in their present grade by November 30 next will be eligible for consideration by the promotion board which is shortly to be convened, notwithstanding that at the time of such consideration they would not have served four years in their present grade.

This reading seems to me to conform to the natural and obvious meaning of the words used and also to the dominant purpose of Congress, which was to enlarge the opportunities for promotion.

¹ The words with line drawn through them show the part of the old statute abrogated by the new. Words in italics show matter introduced by the new statute.

Of course, the provision in the act of August 29, 1916, that "no captains, commanders, or lieutenant commanders who shall have less than four years' service in the grade in which he is serving on November the thirtieth of the year of the convening of the board shall be eligible for consideration by the board," coupled with the further provision that the board could only convene in December of each year, necessarily resulted in preventing the board from considering for promotion any captain, commander, or lieutenant commander who had not *at the time of consideration* completed four years' service in his present grade. This result, however, was directly due to the fixed time set by the act of August 29, 1916, for the convening of the promotion board, namely, the month of December, and therefore no longer held true after the fixed time for the convening of the board was done away with by the act of May 22, 1917, which authorized the board to be convened at any time the exigencies of the service may require.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE NAVY.

GOVERNMENT CONTRACTS—OVERTIME PAY FOR LABORERS AND MECHANICS.

The provision of the naval appropriation act of March 4, 1917 (39 Stat. 1192), relating to overtime pay for work in excess of eight hours, applies to laborers and mechanics engaged upon work covered by contracts with the United States.

DEPARTMENT OF JUSTICE,

July 20, 1917.

SIR: I have the honor to acknowledge receipt of your letter of the 10th instant requesting my opinion upon the question "whether or not the Executive order of March 24, 1917, which makes effective the proviso in the naval appropriation act of March 4, 1917, thereby limits the 'persons' referred to in such proviso who shall be paid time and one-half for all hours of work in excess of the basic day rate of

eight hours' work to such persons as are within the scope of the eight-hour law; or whether the word 'persons' in the naval appropriation act is inclusive of all persons whose time, in whole or in part, is devoted to contracts with the Government."

The provision in the naval appropriation act above referred to reads as follows (39 Stat. 1192):

"That in case of national emergency the President is authorized to suspend provisions of law prohibiting more than eight hours' labor in any one day of persons engaged upon work covered by contracts with the United States: *Provided further*, That the wages of persons employed upon such contracts shall be computed on a basic day rate of eight hours' work, with overtime rates to be paid for at not less than time and one-half for all hours' work in excess of eight hours."

It is not deemed necessary to set forth the Executive order, for, while you refer to it in your question, it furnishes no guide in determining the meaning of the word "persons" in the above statute.

In my judgment it is clear that the "persons" referred to in the proviso are the same "persons" referred to in the earlier part of the enactment as falling within the provisions of the various acts of Congress, to the effect that no laborer or mechanic shall be required or permitted to work more than eight hours in any one calendar day upon work contemplated by any contract to which the United States is a party, e. g., act of June 19, 1912 (37 Stat. 137). The purpose of the enactment was to suspend the provisions of law relating to such "persons," and to substitute for these provisions as to such "persons," and, in so far as the law applied to them, overtime pay for work in excess of eight hours.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF WAR.

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SIGNING CERTIFICATE ATTACHED TO FARM LOAN BONDS.

Under the provision in section 21 of the Federal Farm Loan Act of July 17, 1916 (39 Stat. 377), which requires every farm loan bond to contain a certificate signed by the Farm Loan Commissioner, the certificate may be signed by an engraved facsimile signature of the Farm Loan Commissioner.

DEPARTMENT OF JUSTICE,

August 3, 1917.

SIR: I have the honor to acknowledge receipt of your letter of July 7, 1917, in which you present the question whether, under section 21 of the Federal Farm Loan Act (39 Stat. 360, 377, chap. 245) the certificate of the Farm Loan Commissioner attached to each farm loan bond may be signed by an engraved facsimile signature of the Farm Loan Commissioner, or whether the Farm Loan Commissioner must actually sign such certificate.

A somewhat similar inquiry was answered by Attorney General Wirt in 1 Op. 670, 672-674. He said:

"There would be great difficulty in maintaining the proposition as a legal one, that when the law required *signing*, it means that it must be done with pen and ink. No book has laid down the proposition, or even given color to it. I believe that a signature made with straw dipped in blood, would be equally valid and obligatory; and if so, where is the legal restriction on the implement which the signer may use? If he may use one pen, why may he not use several?—a polygraph, for example, or types—or a *stamp*, which the court, in *Lemaign v. Stanley* (3 Lev. 1), said would be a sufficient satisfaction of the statutory requisition of *signing*. The law requires *signing* merely as an indication and proof of the parties' assent. It places the Treasury of the United States under the guardianship of the Secretary. It requires that no money shall be drawn from the Treasury without his authority. The evidence which it demands of his authority is, that the warrants shall be *signed* by him; but as to the method of *signing*, that is left entirely to himself. He may write his name in full, or he may write his initials; or he may print his initials with a pen; that pen may be made of a goose quill, or of metal; and I see no

legal objection to its being made in the form of a stamp or copperplate. It is still his act; it flows from his assent, and is the evidence of that assent. It is merely directory to the officers who are to act after him—to the comptroller, who is to countersign; the register, who is to record; and the treasurer, who is to pay. Being recognized by the Secretary himself, and known to the officers who are to act after him, the Treasury has all the guards placed over it which the law has provided. It is true, that the stamp may be forged; but so also may the autograph of the Secretary. There would, perhaps, be more difficulty in the latter case than in the former; and the superior facility of forging a stamp, or a copperplate, may be a very good reason why the legislature should, by a positive law, prohibit the use of it, and define *the manner* in which the *signing* shall be done. They have not yet defined it; and the word *signing* does not, as we have seen, necessarily imply, *ex vi termini*, the use of pen and ink, held and guided by the hand of the Secretary himself; it does not imply it *in legal acceptance*, at least.”

This reasoning seems entirely sound, and renders it unnecessary to construe the present act as requiring the certificate to be signed by the Farm Loan Commissioner with his own hand. The requirement of the act is met if the signature of the Farm Loan Commissioner be written, stamped or engraved on the bond under circumstances which make it his own conscious and deliberate act. If he were accustomed to sign his name by a stamp rather than with pen and ink there can be no question that he might authorize this stamp to be affixed in his presence by another person in his behalf. Upon the same principle of physical agency he may authorize the Director of the Bureau of Engraving and Printing from time to time to affix his signature by engraving to certificates upon bonds identified by number or other description, so that the act of the director would be in effect the act of the commissioner himself. It is enough that the signature shall have been affixed by direction of the Farm Loan Commissioner; that he shall have adopted it as his own; and that he shall

have satisfied himself before the bonds have finally issued that the certificate so signed is true in point of fact.

Respectfully,

JOHN W. DAVIS,

Acting Attorney General.

TO THE SECRETARY OF THE TREASURY.

FEDERAL INCOME RETURNS OF CORPORATIONS.

The act of the State of New York (Laws, 1917, ch. 726), which imposes a franchise tax on manufacturing and mercantile corporations, does not impose "a general income tax" within the meaning of the proviso of the Federal income tax act of September 8, 1916 (39 Stat. 772), authorizing proper State officers to have access to and abstracts of income returns of corporations.

The Secretary of the Treasury is not authorized to grant the request of the Governor of New York to have access to the returns of income made to the Federal Government or to abstracts thereof in so far as the request is based upon the aforesaid proviso of the act of September 8, 1916.

DEPARTMENT OF JUSTICE,

August 7, 1917.

SIR: In your letter of the 27th ultimo you requested my opinion as to whether the act of the State of New York, approved June 4, 1917 (ch. 726), and entitled "An act to amend the tax law in relation to a franchise tax on manufacturing and mercantile corporations," imposes "a general income tax" within the meaning of the following provisions of the Federal income tax act approved September 8, 1916 (39 Stat. 756, 772, 773):

"Provided further, That the proper officers of any State imposing a general income tax may, upon the request of the governor thereof, have access to said returns or to an abstract thereof, showing the name and income of each such corporation, joint stock company or association, or insurance company, at such times and in such manner as the Secretary of the Treasury may prescribe."

The relevant provisions of the New York act are as follows:

"SEC. 209. FRANCHISE TAX ON CORPORATIONS BASED ON NET INCOME. For the privilege of exercising its franchises

in this State in a corporate or organized capacity every domestic manufacturing and every domestic mercantile corporation, and for the privilege of doing business in this State, every foreign manufacturing and every foreign mercantile corporation, except corporations specified in the next section, shall annually pay in advance for the year beginning November first next preceding an annual franchise tax, to be computed by the tax commission upon the basis of its net income for its fiscal or the calendar year next preceding, as hereinafter provided, upon which income such corporation is required to pay a tax to the United States.

"SEC. 211. REPORTS OF CORPORATIONS TO TAX COMMISSION. Every corporation taxable under this article as well as foreign corporations having officers, agents or representatives within the State shall annually on or before July first transmit to the tax commission a report in the form prescribed by the tax commission specifying: * * *

"2. The amount of its net income for its preceding fiscal or the preceding calendar year as shown in the last return of annual net income made by it to the United States Treasury Department."

Highly desirable as it is to cooperate with the authorities of the State of New York in the proper enforcement of an act such as the one in question, yet the distinction between a corporate franchise tax computed on the basis of income and a general income tax is too plain and is too firmly fixed in the decisions of the Supreme Court of the United States to permit of any doubt. *Spreckels Sugar Refining Company v. McClain*, 192 U. S. 397, 411, 412; *Flint v. Stone Tracy Company*, 220 U. S. 107, 150; *Stratton's Independence v. Howbert*, 231 U. S. 399, 414; *Brushaber v. Union Pacific R. R.*, 240 U. S. 1.

I have the honor therefore to advise you that the act of the State of New York referred to by you does not impose a general income tax within the meaning of the proviso of the act of September 8, 1916, and that, in so far as the request of the governor of the State of New York to have access to the returns of income made to the Federal Gov-

150 *Food and Drug Act—Single Wrapped Hams.*

ernment or to abstracts thereof is based upon the above proviso of the act of September 8, 1916, you are not authorized to grant it.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

FOOD AND DRUGS ACT—SINGLE WRAPPED HAMS.

Single hams and single sides of bacon wrapped or covered with paper, cloth, or gelatine are not "in package form" within the meaning of the net weight amendment to the Food and Drugs Act.

DEPARTMENT OF JUSTICE,

August 28, 1917.

SIR: I have the honor to comply with the request contained in your letter of January 15, 1917, for my opinion on the question whether single hams and single sides of bacon wrapped or covered with paper, cloth, or gelatine are "in package form" within the meaning of the act of March 3, 1913 (37 Stat. 732), commonly known as the net weight amendment to the Food and Drugs Act (34 Stat. 768). The rendition of the opinion was delayed at the request of the solicitor of the Department of Agriculture pending informal conferences between him and this Department. The solicitor has now requested by letter dated the 21st instant that the opinion be rendered as soon as convenient.

The net weight amendment provides in substance that an article of food shall be deemed to be misbranded, under the food and drugs act—

"If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however,* That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section three of this Act."

It appears from your letter that in Service and Regulatory Announcements, Chemistry No. 6, issued July 17, 1914, the Department of Agriculture, which is charged with the administrative enforcement of the Food and Drugs Act, ruled that single hams and single sides of bacon wrapped or covered with paper, cloth, or gelatine are not "in package form" within the meaning of the net weight amendment. This ruling has been in effect continuously.

While as is usually the case where elastic words have to be construed, there is more than one side to the question, I am certainly not prepared to say that the construction adopted by the Department of Agriculture is clearly erroneous; and where the department of Government primarily charged with the enforcement of a statutory provision has adopted a construction and that construction has been in practical operation for several years, I do not think that the Attorney General should disturb it unless of opinion that it is clearly erroneous. *United States v. Philbrick*, 120 U. S. 52, 59; *United States v. Moore*, 95 U. S. 760, 763; *United States v. Hammers*, 221 U. S. 220, 228-229; *Illinois Surety Co. v. United States*, 215 Fed. 334, 338 (C. C. A. 4th Cir.); 27 Op. 446; 26 Op. 390; 20 Op. 648; 20 Op. 719.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF AGRICULTURE.

ISSUANCE OF PASSPORTS BY GOVERNOR OF PORTO RICO.

The governor of Porto Rico may be authorized to issue passports under the provisions of section 4075 of the Revised Statutes, as amended by the act of June 14, 1902 (32 Stat. 386).

DEPARTMENT OF JUSTICE,

August 30, 1917.

SIR: I have the honor to acknowledge the receipt of the communication of the Acting Secretary of State dated July 25, 1917, requesting reconsideration of the opinion of May 8, 1917, upon the question whether, in view of the act of March 2, 1917 (39 Stat. 951), "to provide a civil gov-

ernment for Porto Rico and for other purposes," the governor of Porto Rico has authority, or may be granted authority, to issue passports.

The issuance of passports is controlled by section 4075 of the Revised Statutes as amended June 14, 1902 (32 Stat. 386), providing as follows:

"SEC. 4075. The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and by such chief or other executive officer of the *insular possessions of the United States*, and under such rules as the President shall designate and prescribe for and on behalf of the United States; and no other person shall grant, issue, or verify any such passport. * * *

In your letter of April 11, 1917, submitting the question above referred to, it was stated that by the "rules governing the granting and issuing of passports in the insular possessions of the United States," signed by the President July 19, 1902, the chief executive of Porto Rico was authorized to issue passports in that island; and it was suggested that in answering the question submitted it seemed "necessary to determine whether Porto Rico now has the status of one of the 'insular possessions of the United States' or whether it is an organized Territory and a part of the United States proper."

In the opinion of May 8, 1917, it was stated that inasmuch as Porto Rico has the status of an organized Territory it is no longer an "insular possession of the United States," and that accordingly the governor of Porto Rico has not, and can not be granted, authority to issue passports.

The Acting Secretary of State now transmits with his letter of July 25, 1917, a copy of a letter of the Secretary of War and of a memorandum by the Chief of the Bureau of Insular Affairs supporting the view that the present political status of Porto Rico as an organized Territory is not inconsistent with that of an "insular possession of the United States."

I am convinced that this view is correct and that the opinion of May 8, 1917, is erroneous. The words "insular possessions of the United States" in their natural meaning more aptly refer to geographical location than to a particular form of government. Unless, therefore, those words as used in this statute have some other meaning, a Territory of the United States may at the same time be an insular possession of the United States. There is nothing to indicate that Congress intended to use them here in any other than their natural meaning. On the contrary, the instances cited by the Chief of the Bureau of Insular Affairs show that the practice of Congress has been to use the words in a geographical sense and consequently as including Territories, when separated by water from the continental United States, such as Porto Rico and Hawaii.

It follows that the governor of Porto Rico may still be authorized to issue passports under section 4075 of the Revised Statutes, as amended. In this aspect of the question it is unnecessary for me to express any view as to the present status of Porto Rico as an organized or unorganized Territory, and I accordingly withdraw what was said in my opinion of May 8, 1917, on that point.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF STATE.

STATE BANKS JOINING FEDERAL RESERVE SYSTEM.

The restrictions relating to interlocking directorates imposed by section 8 of the Clayton Act of October 15, 1914 (38 Stat. 732), do not apply to State banks joining the Federal Reserve System.

DEPARTMENT OF JUSTICE,

September 10, 1917.

SIR: I have the honor to acknowledge the receipt of your letter of August 3 inclosing a letter of the 2d instant from the governor of the Federal Reserve Board to you and requesting my opinion upon the question propounded by him, as to whether State banks joining the Federal Reserve System become subject to the provisions of the Clayton Act (approved October 15, 1914 (38 Stat.

732), amended by act of May 15, 1916 (39 Stat. 121), relating to interlocking directorates.

The pertinent provisions of the Clayton Act are found in section 8, as follows:

*" * * * no person shall at the same time be a director or other officer or employee of more than one bank, banking association, or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States * * * ."*

*"No bank, banking association, or trust company, organized or operating under the laws of the United States, in any city * * * of more than two hundred thousand inhabitants * * * shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place."*

The prohibitions of this section relate to banks which are "*organized or operating under the laws of the United States.*" Obviously, the section does not apply to State banks merely as State banks, but applies to them, if at all, only in consequence of membership in the Federal Reserve System.

The Federal Reserve System embraces (1) national banks, whose membership is compulsory, and (2) banks organized under the "*laws of any State or of the United States,*" which are eligible for membership under conditions prescribed in section 9 of the Federal reserve act (approved December 23, 1913; 38 Stat. 251). Besides banks organized under State laws and doing business in the States (hereinafter called State banks), the latter class includes (a) banks organized under State laws, but having offices and receiving deposits in the District of Columbia, as described in section 713 of the Code

of the District of Columbia, and (b) banks and trust companies, other than national banks, organized under the laws of the United States, i. e., banks and trust companies organized under subchapters 4 and 11 of chapter 18 of the Code of the District of Columbia (31 Stat. 1189).

National banks and banks and trust companies organized under the Code of the District of Columbia are clearly within the prohibitions of section 8 of the Clayton Act. They are not only organized under the laws of the United States, but of necessity operate under those laws as the laws of their existence.

Banks organized under State laws and carrying on business in the District of Columbia also fall within the prohibitions of section 8 as "banks operating under the laws of the United States"; for in carrying on business in the District, over which Congress exercises exclusive legislation, they are not only subject generally to the laws of the United States in force within the District, but by specific enactment they are required to make reports to the Comptroller of the Currency and are subject to be examined and taken possession of by him as provided with respect to national banks. (Act of June 25, 1906, amending sections 713 and 714, Code D. C.; 34 Stat. 458.)

State banks which join the Federal Reserve System do not, however, operate under the laws of the United States as the laws of their existence, nor in territory over which the United States exercises exclusive legislation. These banks have merely voluntarily accepted the terms and provisions of the Federal reserve act (including regulations made pursuant thereto) in becoming members of the Federal Reserve System, from which they are at liberty to withdraw. Yet, since upon being admitted they become subject to the terms and provisions of the Federal reserve act, they may also be aptly described as "operating under the laws of the United States." Accordingly, section 8 of the Clayton Act standing alone might reasonably be construed to include State member banks within its prohibitions.

Section 8 of the Clayton Act must be considered, however, in the light of the provisions of section 9 of the Federal reserve act relating to membership of State banks.

Unlike national banks, State banks are not compelled, but in effect are invited, to join the Federal Reserve System. In section 9 as originally enacted Congress specified the provisions of law to which State banks must conform as conditions of membership, including in the specification certain provisions of preexisting law. The conditions of membership for State banks having thus been specified it could be argued not without reason that if Congress had intended by section 8 of the Clayton Act to prescribe further conditions of membership it would have affirmatively expressed that intention, which it has not done.

But, whatever the original intention of Congress may have been in this respect, the present intention seems plainly to appear from the following provisions of section 9 of the Federal reserve act as amended and reenacted by the act of June 21, 1917 (40 Stat. 232, 234), after the passage of the Clayton Act:

"Banks becoming members of the Federal Reserve System under authority of this section shall be subject to the provisions of this section, and to those of this Act which relate specifically to member banks, but shall not be subject to examination under the provisions of the first two paragraphs of section fifty-two hundred and forty of the Revised Statutes as amended by section twenty-one of this Act. Subject to the provisions of this Act and to the regulations of the board made pursuant thereto, any bank becoming a member of the Federal Reserve System shall retain its full charter and statutory rights as a State bank or trust company, and may continue to exercise all corporate powers granted it by the State in which it was created, and shall be entitled to all privileges of member banks."

As thus amended, State member banks are made "subject to the provisions of this section and to those of this act which relate specifically to member banks." Accordingly, they would appear not to be subject to the prohibitions of section 8 of the Clayton Act under the rule of construction embodied in the maxim, "The express mention of one thing impliedly excludes all others."

The intention of Congress, however, is not left to appear by implication alone. Section 9 as amended goes further, and by positive provision declares that State member banks shall retain their "full charter and statutory rights" as State banks, "subject to the provisions of this act and to the regulations of the board made pursuant thereto." Since the rights existing under State laws as to selection of directors seem clearly among the "charter and statutory rights" thus retained in *full* by State member banks, they must be held free in that regard from the restrictions imposed by section 8 of the Clayton Act.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE SECRETARY OF THE TREASURY.

APPOINTMENT OF RECEIVER FOR UNION NATIONAL BANK.

The Comptroller of the Currency has authority, under section 1 of the act of June 30, 1876 (19 Stat. 63), to appoint a receiver to enforce the individual liability of the shareholders of a national bank on the ground of its insolvency after as well as before it has gone into voluntary liquidation.

The Comptroller of the Currency has no authority to appoint a receiver for the Union National Bank of Indianapolis, Ind., to enforce the statutory liability of its shareholders, under the circumstances herein stated.

DEPARTMENT OF JUSTICE,
September 24, 1917.

SIR: I have the honor to acknowledge the receipt of your letter of March 27, 1917, with inclosures, requesting my opinion as to whether the Comptroller of the Currency has authority to appoint a receiver for the Union National Bank of Indianapolis, Ind., to enforce the statutory liability of its shareholders, under circumstances stated by you as follows:

"In January, 1912, the National City Bank of Indianapolis was organized for the purpose of taking over the assets and assuming the liabilities of the Union National Bank and the Columbia National Bank, both of Indianapolis, the two latter banks having gone into volun-

tary liquidation. It appears that after the Union National Bank had gone into voluntary liquidation, either it or its liquidating agents borrowed from the National City Bank something over \$200,000, the security for which has since proven to be worthless. The former creditors of the Union National Bank were paid in full and the proceeds of this loan, together with other assets of the bank, were apparently used to pay a dividend to stockholders of seventy-five per cent.

"The National City Bank of Indianapolis, in order to collect the balance due on the note referred to (amounting to about \$80,000), has asked the office of the comptroller to appoint a receiver for the purpose of levying an assessment against the stockholders of the Union National Bank. By advice of counsel, the comptroller declined to take this action, on the ground that the act of June 30, 1876, provided a clear remedy for the collection of an assessment by the creditors of the bank after it had gone into voluntary liquidation, and that there was serious doubt of his right, as comptroller, to appoint a receiver under the circumstance."

You further state that—

"at the time of the execution of the note now held by the National City Bank it does not appear that the liquidating bank was technically insolvent, since it apparently realized from its assets a sufficient sum to pay all the creditors of the bank, and since the proceeds of the note were apparently used to make a distribution among the stockholders."

The authority of the comptroller to appoint a receiver for a national banking association on the ground of insolvency is derived from the act of June 30, 1876 (19 Stat. 63), which contains the following provisions:

"SEC. 1. That whenever * * * the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, * * * appoint a receiver, who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said [revised] statutes.

"SEC. 2. That when any national banking association shall have gone into [voluntary] liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought * * * in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

"SEC. 3. That whenever any association shall have been or shall be placed in the hands of a receiver, * * * and when * * * the Comptroller of the Currency shall have paid to each and every creditor of such association * * * whose claim or claims * * * shall have been proved or allowed * * * the full amount of such claims and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for * * * , the Comptroller of the Currency shall call a meeting of the shareholders * * *. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose * * *. In case the said meeting shall * * * determine that an agent shall be elected, * * * such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof for the benefit of the shareholders of such association * * *." (As amended, 29 Stat. 601.)

Section 1 in terms authorizes the comptroller to appoint a receiver to close up a national bank and enforce if necessary the individual liability of its stockholders *whenever* he becomes satisfied of its insolvency. But it is suggested that, since section 2 expressly mentions a remedy for enforcing the individual liability of shareholders of a bank in course of voluntary liquidation, that remedy must be regarded as exclusive and the authority conferred upon the

comptroller by section 1 to appoint receivers for insolvent banks confined to cases of involuntary liquidation.

I.

The first question presented by the case submitted, then, is, Has the comptroller authority under section 1 to appoint a receiver to enforce the individual liability of shareholders of an insolvent bank after it has gone into voluntary liquidation?

Individual liability for the debts of a national bank was imposed upon its shareholders by section 12 of the national bank act of 1864 (R. S. sec. 5151). Provision was also made in a number of cases for the appointment by the comptroller of a receiver to wind up the affairs of a bank and to enforce where necessary the individual liability of shareholders. (Sec. 15, R. S. sec. 5141; sec. 31, R. S. sec. 5191; sec. 32, R. S. sec. 5195; sec. 35, R. S. sec. 5201; sec. 50, R. S. sec. 5234; act of Mar. 3, 1869, R. S. sec. 5208; act of Mar. 3, 1873, R. S. sec. 5205.)

Prior to 1876, however, the comptroller possessed no authority to appoint a receiver of a national bank on the ground of its insolvency. To remedy this and other defects in the then existing law, the act of June 30, 1876, was passed, upon the request of the Comptroller of the Currency made in a letter of March 6, 1876, explaining the bill as prepared by him. (See Cong. Rec., 44th Cong., 1st sess., p. 2227.) In this letter the provision of section 1 quoted above was explained as—

“intended to authorize the Comptroller to appoint receivers of national banks in *all cases of insolvency* of such institutions, and experience has shown that such a provision is necessary.”

The purpose of section 2 was explained as follows:

“In several cases of banks in voluntary liquidation a small amount of indebtedness remains unpaid. Under existing laws the comptroller has no power to appoint receivers in such cases; but it is necessary under the decision of the Supreme Court [*Kennedy v. Gibson*, 8 Wall. 505-6] for him to appoint a receiver in order that the personal lia-

bility may be enforced. If the creditors could bring a suit in their own name against the shareholders, it is probable that the amount of indebtedness in every such instance could be collected without the necessity of the expense of a receivership. If the bill under consideration should become a law, any creditor, in his own behalf, or in behalf of himself and other creditors, might enforce individual liability against shareholders of national banks."

It seems clear from this explanation, which was apparently accepted by Congress, that the remedy given to creditors by section 2 was understood to be merely cumulative and not designed to impair or restrict the authority conferred upon the comptroller by section 1.

It was accordingly held in *Washington National Bank v. Eckels* (1893; 57 Fed. 870) that the comptroller may appoint a receiver, when satisfied that a bank is insolvent, to close up its affairs and enforce the liability of its stockholders, even though the bank has previously gone into voluntary liquidation.

Doubt is said to be thrown upon this construction of the act by the opinion in the case of *Williamson v. American National Bank* (C. C. A., 4th cir., 1902; 115 Fed. 793). In that case the assignee of a bank at Asheville, N. C., which was in voluntary liquidation, and a creditor of the bank filed a bill in equity in South Carolina against a single shareholder to enforce his individual liability. The bill was demurred to on the grounds that the Circuit Court of North Carolina alone had jurisdiction of such a bill, that the other shareholders of the bank were necessary parties, and that there was a misjoinder of plaintiffs.

In sustaining the demurrer it was stated in the opinion by Judge Keller, among other reasons, that the remedy provided by section 2 for enforcing the liability of shareholders of a bank in process of voluntary liquidation "is exclusive in such cases and must be strictly pursued"; citing *Pollard v. Bailey* (20 Wall. 527) and *Bank v. Francklyn* (120 U. S. 747), which hold that where the same act creates a right and provides a remedy for its enforcement such remedy is exclusive.

This view of section 2 is expressly disapproved in the more recent case of *King v. Pomeroy* (C. C. A., 8th cir., 1903; 121 Fed. 287), in which it is clearly shown by the opinion of Judge Sanborn that the act of June 30, 1876, does not create a right against shareholders in favor of creditors and prescribe an exclusive remedy for the enforcement of the right, but that on the contrary the right against shareholders was created by the act of 1864 (R. S. sec. 5151), that from the time of the creation of this right ample remedy had existed for its enforcement through the general powers of the equity courts and that section 2 did not abrogate or limit that remedy but merely added another—

“under the familiar rule that where a statute simply gives a new remedy in a case in which the right and an appropriate remedy existed before its enactment, it is cumulative and not exclusive” (p. 292).

The opinion of Judge Sanborn, which seems to be supported by *Richmond v. Irons* (121 U. S. 27), is believed to express the proper view of the statute, and his reasoning is thought to apply with equal force to show that the remedy given in section 2 to the shareholders is likewise cumulative and not exclusive in its relation to the remedy provided in section 1 to be pursued by the comptroller.

In my opinion, therefore, the comptroller has authority to appoint a receiver for a bank on the ground of its insolvency after as well as before it has gone into voluntary liquidation and for the same purposes.

II.

This view of the statute being accepted, it remains to be determined whether the authority of the comptroller extends to the appointment of a receiver for a bank in course of voluntary liquidation under the particular circumstances of the case submitted.

The intention of Congress in passing the Act of June 30, 1876, as observed in *Richmond v. Irons* (*supra*, p. 50), “evidently was to provide ample and effective remedies for

the protection of the public and the payment of creditors by the application of the assets of the bank and the enforcement of the liability of the stockholders"; this liability, though "not strictly an asset of the bank," being "treated as a means of creating a fund to be applied with and in aid of the assets of the bank toward the satisfaction of its obligations." By virtue of section 3, the authority of the comptroller to withhold through his receiver the control of the bank from its shareholders ceases as soon as the claims of creditors are paid and provision made for the expenses of the receivership and the redemption of the bank's circulating notes, for the shareholders must then determine whether the winding up of the affairs of the bank shall continue through the receiver or through an agent elected by them. Plainly, therefore, authority to appoint receivers is conferred upon the comptroller by section 1 primarily to insure payment of the claims of creditors and redemption of the bank's circulating notes.

In the present case no question is made as to the provision for redemption of circulating notes (prescribed by sections 5222 and 5223, Revised Statutes), and the assets have already been disposed of; so that the receivership is here sought solely on the ground of the interest of creditors and solely for the purpose of enforcing the individual liability of shareholders.

The National City Bank, which is seeking the receivership, was not a creditor at the time the Union National Bank went into voluntary liquidation. That the Union National Bank was not then insolvent is indicated by the fact that its liquidating agents subsequently realized from its assets and the loan obtained from the National City Bank an amount sufficient to pay the creditors in full and a large dividend (75 per cent) to the shareholders. Indeed it does not appear that the assets have been found insufficient to pay all creditors existing when the bank went into voluntary liquidation, but merely that the assets have fallen short of paying in full the loan, the proceeds of which "were apparently used to make a distribution among the stockholders."

But even if a receiver had been appointed for the protection of the creditors in the belief that the bank was insolvent and it had turned out that he was able to pay their claims in full, then his further continuance as receiver would have been subject to the election and in the interest of the shareholders alone. It accordingly seems that the liquidating agents in paying the creditors performed the full service that a receiver could have performed for them had he been appointed for their protection at the beginning of liquidation. And it would seem further that upon the payment of the creditors the reason, and with the reason the authority, for appointing a receiver for their protection would cease.

It is urged, however, that in obtaining the loan while the bank was in course of liquidation a contract was entered into on its behalf with the National City Bank for the performance of which individual liability is imposed upon the shareholders to be enforced by a receiver appointed by the comptroller under section 1.

This contention is thought to be untenable. In *Richmond v. Irons (supra)* it is said:

"The individual liability of the stockholders as imposed by and expressed in the statute, is indeed for all the contracts, debts, and engagements of such association, but that must be restricted in its meaning to such contracts, debts, and engagements as have been duly contracted in the ordinary course of its business. That business ceased when the bank went into liquidation; after that there was no authority on the part of the officers of the bank to transact any business in the name of the bank so as to bind its shareholders, except that which is implied in the duty of liquidation, unless such authority had been expressly conferred by the shareholders. * * * That duty [of liquidation] consists in the collection and reduction to money of the assets of the bank, and the payment of creditors equally and ratably so far as the assets prove sufficient. * * * This is the very meaning of the word 'liquidation.' Mr. Justice Story said, in *Fleckner v. Bank of the United States* (8 Wheat. 338, 362): 'Its ordinary

sense, as given by lexicographers, is to clear away, to lessen debt, and, in common parlance, especially among merchants, to liquidate the balance is to pay it'" (pp. 60, 61).

Clearly the loan obtained in the present instance upon the assets of the bank while in voluntary liquidation was not a loan in the ordinary course of business nor impliedly authorized as an incident of liquidation. It did not constitute a collection and reduction into money of the assets of the bank nor was it designed to raise funds for the conservation of the assets until such collection and reduction could be had. Its purpose apparently was to raise money in advance of such collection out of which creditors might be immediately paid and a dividend distributed to the shareholders. Of course, as pointed out in *Richmond v. Irons (supra)*, the shareholders might have expressly conferred upon the liquidating agents the power to render them liable for the loan made by the National City Bank. It may also be asserted that an equitable duty rests upon the shareholders to restore pro rata the dividend prematurely received by them, as to which matter I, of course, express no opinion. Any such liability, however, would be founded upon general principles of law and would not be the individual statutory liability imposed by section 5151 which the comptroller is authorized to enforce through receivership.

From what has been said it follows that in my opinion the comptroller has no authority to appoint a receiver for the Union National Bank under the circumstances stated in your letter.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE SECRETARY OF THE TREASURY.

MANUFACTURERS AIRCRAFT ASSOCIATION — ANTITRUST
LAWS.

Upon the data submitted, the Manufacturers Aircraft Association, incorporated under the laws of the State of New York, as now constituted, and the cross-license agreement under which it is now operated, are not in contravention of the antitrust laws of the United States.

DEPARTMENT OF JUSTICE,
October 6, 1917

SIR: I have the honor to acknowledge the receipt of your letter of September 17, 1917, in which you ask for my opinion concerning the legal status of the Manufacturers Aircraft Association, incorporated under the laws of the State of New York, and in particular whether the cross-license agreement entered into between that corporation and its subscribers (stockholders) is in any way in contravention of the antitrust statutes of the United States.

You submitted with your letter a copy of the cross-license agreement, and a digest of certain of the minutes of the National Advisory Committee for Aeronautics (hereafter referred to as Advisory Committee) relating to the subject. The other papers and information necessary for determination of the questions involved were not immediately available but have since been furnished by that committee at various dates from September 19 to 28.

The Manufacturers Aircraft Association (Inc.) (hereafter referred to as Association, Inc.), was formed and the cross-license agreement entered into under the following circumstances as gathered from the data submitted:

The principal patents in the airplane industry were controlled by the Wright-Martin Aircraft Corporation and the Curtiss Aeroplane & Motor Corporation. The former, controlling what it claimed to be a basic patent, was demanding high royalties from all other aircraft manufacturers. The latter, controlling numerous important patents, was likewise making demands for royalties upon the other aircraft manufacturers. The patents controlled by these companies were of such a character as to make it difficult for any aircraft manufacturer to construct any

modern approved form of airplane without infringing one or more alleged patents of each of these companies. The result of these patent claims was not only to render the cost of airplanes to the Government excessive, but also to make it difficult for the Government to get its orders filled, because some of the airplane manufacturers, in view of impending patent litigation, were unwilling to make further expenditures upon their plants.

Confronted with this serious crisis, the War Department and the Navy Department requested the Advisory Committee to investigate the situation and to suggest a solution for the unsatisfactory conditions existing in the airplane industry. Acting in accordance with these requests the Advisory Committee proceeded to make a careful study of the situation, and after several months of investigation and numerous conferences with all interests directly involved, recommended the formation of an association of aircraft manufacturers with a form of cross-license agreement.

Pursuant to the recommendation of that committee, the Association (Inc.), was formed and the cross-license agreement now under consideration was entered into.

Practically all of the manufacturers of airplanes have since become stockholders in the Association (Inc.) and parties to the cross-license agreement. The royalties to be paid under the cross-license agreement in respect to the patents of both the Wright-Martin and Curtiss corporations are materially lower than those previously demanded by the Wright-Martin Corporation alone. The arrangement will result in a substantial saving to the Government.

You state in your letter:

"In accordance with the arrangement thus developed, the War Department now desires to proceed with the placing of contracts for airplanes with airplane manufacturers thus organized."

The Federal antitrust laws prohibit every combination and agreement that produces or tends to produce a monopoly in the interstate and foreign commerce of the United States or that is otherwise unduly restrictive of competi-

tive conditions in such commerce. Their fundamental purpose is to prevent undue interference with the free play of competition without prohibiting normal and usual contracts and agreements entered into for the purpose of promoting the legitimate interests of the trader or of the industry in which he is engaged. The questions here involved must be determined in the light of this fundamental purpose of the antitrust laws.

In considering the questions submitted I have examined the cross-license agreement, the articles of incorporation, the by-laws and the voting trust agreement of the Association (Inc.), together with other data relating to that association furnished by the Advisory Committee. I have also examined and considered the criticisms of the arrangement in the "Protest of the Aeronautical Society of America against the formation under Government auspices of an aircraft trust."

The cross-license agreement between the Association (Inc.), and such persons (hereinafter called subscribers) as shall become stockholders therein, was entered into on July 24, 1917. (Cross-License Agreement, p. 1.) The subscribers under that agreement agree—

To grant to each other licenses under all airplane patents of the United States (with unimportant exceptions) now or hereafter owned or controlled by them. (Cross-License Agreement, Art. II, p. 2.)

To appoint the Association (Inc.) their agent with full power to grant the nonexclusive licenses provided for in the agreement, in the form attached thereto. (Art. III, pp. 3, 15.)

Not to contract for rights under any airplane patents in such a way as to prevent the owner from granting similar rights to other subscribers on the same terms, unless the subscriber at the same time obtains the further privilege of itself granting rights under the patent, which of itself shall have the effect of bringing the rights acquired by the subscriber under the operation of the cross-license agreement. (Art. III, pp. 3-4.)

Not to enter into any agreement in respect to the subscriber's privileges under any airplane patent in such a

way as to restrict the operation of the cross-license agreement in respect thereto. (Art. IV, p. 4.)

Not to grant licenses under airplane patents to others than subscribers upon lower terms of royalty than those provided for in the agreement in the case of subscribers. (Art. IV, p. 4.)

To submit claims for compensation in respect to airplane patents or patent rights hereafter acquired to a board of arbitrators consisting of one member appointed by the board of directors of the Association (Inc.), another by the subscriber making the claim, and a third by the other two, who shall determine the total amount of compensation, if any, to be paid for the same, and the rate of royalty to be paid toward such compensation by any subscriber desiring to take a license under such patent. (Art. V, pp. 4-5.)

To waive all claims as against each other for infringements prior to July 1, 1917 (Art. XIV, p. 13); to make various reports and to keep various accounts, etc.

To pay to the Association (Inc.) specified amounts upon every airplane manufactured and sold by the subscriber until the expiration of specified patents controlled by the Wright-Martin and Curtiss corporations, or until each of those corporations shall have received the aggregate sum of \$2,000,000, and to make other payments of minor importance. (Art. VIII, pp. 8-9.)

The Association (Inc.) agrees:

To accept the appointment as agent of its subscribers, for granting and enforcing the license provided for in the agreement, and for enforcing the other obligations of the subscribers under the agreement. (Art. II, p. 3.)

To make specified payments to the Wright-Martin and Curtiss corporation until the expiration of designated patents or until each of those corporations shall have received the aggregate sum of \$2,000,000, and to pay to the other subscribers the royalties, if any, to which they are entitled under the cross-license agreement. (Art. IX, pp. 9-10.)

The cross-license agreement, as appears from its principal provisions summarized above, makes available to each subscriber of the Association (Inc.) the patents of all the

other subscribers, and thus in this important respect instead of restraining trade facilitates competition among the subscribers of that association.

To thus make the patents of each available to all it was, of course, necessary to provide special compensation for those controlling the more important patents in the industry. This, as appears from the data submitted by the Advisory Committee, was the reason for the special payments to the Wright-Martin and Curtiss corporations.

The provision requiring these payments to be made to these corporations upon *every* airplane manufactured and sold by the subscribers at first sight seems objectionable as possibly designed to extend the patent rights of these corporations to objects not covered by their patents.

However, the circumstances which led to the negotiation of the cross-license agreement refute this. The numerous patents controlled by the Wright-Martin and Curtiss corporations made it difficult for a manufacturer to construct an up-to-date airplane without infringing one or more of the alleged patents of each of these corporations.

For this reason the Advisory Committee deemed it advisable to provide for a fixed payment to be made to these corporations in respect to every airplane manufactured and thus avoid the controversies which would almost inevitably arise if the payment were made dependent upon the delicate question of which and how many of the patents of the Wright-Martin and Curtiss corporations had been used in the manufacture of a particular airplane.

The provision requiring subscribers to submit claims for compensation in respect to patents subsequently acquired by them to a board of arbitrators and to license each other under such patents at the rates of royalty fixed by that board might possibly be used to secure valuable inventions at unreasonable compensation. But it serves the purpose of keeping the patents of each of the subscribers open to all, and that doubtless was the purpose for which it was adopted. Its possible abuse, therefore, scarcely justifies its condemnation in the absence of such abuse.

Not to go into further detail, the provisions of the cross-license agreement seem to me to be reasonably adapted to

secure cooperation among the parties to the agreement in the interchange of their patent privileges without imposing by their necessary effect any undue restriction of competition in violation of the Federal antitrust laws, but rather rendering competition freer by giving every responsible manufacturer of aircraft access to all the inventions in that field.

The by-laws of the Association (Inc.) authorize any responsible manufacturer or prospective manufacturer of airplanes, or any manufacturer to whom the United States has given a contract for the construction of ten or more airplanes, or any owner of the United States patents relating to the same, to become a party to the cross-license agreement upon subscribing for a share of the stock of that association and signing the voting trust agreement provided for in the by-laws.

The certificate of incorporation of the Association (Inc.) limits the stock of that association to 100 shares, of no nominal or par value, and authorizes it to issue and sell the same from time to time at their fair market value. The subscription value of this stock has since been fixed by the Association (Inc.) at \$1,000 per share. The Association (Inc.) under its certificate of incorporation enjoys broad powers not material to the validity of the arrangement here under consideration.

The limitation of the number of shares of capital stock to 100, taken in connection with other provisions of the by-laws and cross-license agreement, has the effect of limiting the number of aircraft manufacturers who may become parties to the cross-license agreement to 100. In the expansion of the industry this limitation may prove objectionable, but the Advisory Committee informs me that that number is far beyond the probable number of such manufacturers in the near future.

The voting trust agreement in effect gives the management of the Association (Inc.) for a period of five years to three voting trustees, to wit, a representative of the Wright-Martin and Curtiss corporations, a representative of the smaller manufacturers, and a member of the Advisory Committee.

The most questionable provision in the entire arrangement is that requiring the aircraft manufacturers who become stockholders in the Association (Inc.) and parties to the cross-license agreement to sign the voting trust agreement. This provision, however, in view of the circumstances noted below, does not in my opinion constitute a restraint of trade in violation of the Federal antitrust laws.

The primary functions of the Association (Inc.) so far as material to the arrangement here under consideration, are to act as an agent for the parties to the cross-license agreement in executing prescribed licenses, collecting and distributing royalties, and appointing through its board of directors one of the arbitrators to pass upon the value of patents acquired subsequent to the execution of the cross-license agreement.

Under the arrangement the interests of the Wright-Martin and Curtiss corporations, as owners of the principal patents and entitled to the bulk of the royalties provided for in the agreement, are somewhat antagonistic to the interests of the smaller manufacturers who have to pay these royalties. If all the manufacturers had been given equal voice in the Association (Inc.) the smaller manufacturers together would have been enabled to control the Association (Inc.), to wit, the agent of the parties in whose responsibility and vigilance the Wright-Martin and Curtiss corporations are so vitally interested. This conflict of interest accounts for the adoption of the voting trust agreement under which the Wright-Martin and Curtiss corporations named one trustee, the smaller manufacturers another trustee, and a party not favorable to either interest, namely, a member of the Advisory Committee, was selected for the third trustee.

Not to go into further detail, it suffices to say that upon the data submitted to me I am of the opinion that the Association (Inc.) as now constituted, and the cross-license agreement under which it is now operated, are not in contravention of the antitrust laws of the United States.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF WAR.

NAVAL RESERVE FORCE—PROVISIONAL ASSIGNMENTS.

Under the provisions of the act creating a Naval Reserve Force of August 29, 1916 (39 Stat. 587, 588), when an enrolled member in the Naval Reserve Force has been given a provisional rank, he may thereafter, either with or without being confirmed in such provisional rank, be given a higher provisional rank without examination by the statutory board of three naval officers of or above the rank of lieutenant commander and the statutory board of naval surgeons.

DEPARTMENT OF JUSTICE,

October 20, 1917.

SIR: In your letter of the 21st ultimo you asked my opinion as to the proper construction of certain provisions of the act of August 29, 1916 (39 Stat. 556, 587, 588), creating a Naval Reserve Force, with special reference to certain cases of provisional assignments thereunder, arising in the administration of your Department.

The relevant provisions of the act are as follows:

"The Naval Reserve Force shall be composed of citizens of the United States who, *by enrolling* under regulations prescribed by the Secretary of the Navy or by transfer thereto as in this Act provided, obligate themselves to serve in the Navy in time of war or during the existence of a national emergency, declared by the President:

* * * * *

"There shall be *allowed* in the Naval Reserve Force the various *ratings, grades, and ranks*, not above the rank of lieutenant commander, corresponding to those in the Navy. * * *

"Members of the Naval Reserve Force *appointed to commissioned* grades shall be commissioned by the President alone, and members of such force appointed to warrant grades shall be warranted by the Secretary of the Navy: *Provided*, That officers so warranted or commissioned shall not be deprived of the retainer pay, allowances, or gratuities to which they would otherwise be entitled. Officers of the Naval Reserve Force shall rank with but after officers of corresponding rank in the Navy.

"*Enrollment and reenrollment* shall be for terms of four years, but members shall in time of peace, when no

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national emergency exists, be discharged upon their own request upon reimbursing the Government for any clothing gratuity that may have been furnished them during their current enrollment.

* * * * *

“When first *enrolled* members of the Naval Reserve Force, except those in the Fleet Naval Reserve, shall be given a *provisional grade, rank or rating* in accordance with their qualifications determined by examination. They may thereafter, upon application, be assigned to active service in the Navy for such periods of instruction and training as may enable them to qualify for and be *confirmed in such grade, rank or rating.*”

“No member shall be *confirmed in his provisional grade, rank or rating* until he shall have performed the minimum amount of active service required for the class in which he is *enrolled*, nor until he has duly qualified by examination for such *rank or rating* under regulations prescribed by the Secretary of the Navy.

“No person shall be *appointed or commissioned as an officer* in any rank in any class of the Naval Reserve Force, or *promoted* to a higher rank therein, unless he shall have been examined and recommended for such *appointment, commission, or promotion* by a board of three naval officers not below the rank of lieutenant commander, nor until he shall have been found physically qualified by a board of medical officers to perform the duties required in time of war, * * *.” [Italics mine.]

The specific question you ask, involving the construction of the above language, is as follows:

“When an enrolled member in the Naval Reserve Force has been given a provisional rank, may he thereafter, either with or without being confirmed in such provisional rank, be given a higher provisional rank without examination by the statutory board of three naval officers of or above the rank of lieutenant commander and the statutory board of naval surgeons?”

In my judgment this question should be answered in the affirmative.

1. While the provisions above quoted requiring a particular kind of formal examination for those persons "appointed or commissioned" as officers in any rank in any class of the Naval Reserve Force, or "promoted" to a higher rank therein, might possibly, if standing alone, be broad enough to cover provisional assignments to "rank, grade, or rating," yet, when read in connection with the other provisions, they clearly connote only permanent appointments to offices in the Naval Reserve Force. "Enrollment" is constantly used as the distinguishing word for entrance into the service instead of "appointment." "Confirmation" sets the seal of approval instead of "commission." Such temporary designations are known and sustained in the law as something entirely different in their nature from permanent appointments. (*Taylor v. United States*, 38 Ct. Cls. 155; 15 Op. 564; 20 ib. 358; 22 ib. 480; 28 ib. 526; 31 ib. 80.) Moreover, to construe the provisions relating to examinations for "appointment" or "promotion" as covering provisional assignments or confirmations would make them conflict with the prior provisions establishing a different kind of examination for the latter. Clearly, then, the provisions as to examinations for "appointment" or "promotion" have no application to the case.

2. The only other objection seems to be that the power to assign to provisional grade, rank, or rating applies only to the first enrollment of a person. To so construe them would be to stick in the letter of the statute. The reasons which induced Congress to provide for these provisional assignments on first enrollment are equally applicable during the entire war or emergency referred to. There is nothing to indicate that the power was given to be exercised only once and then to become *functus officio*. The original provisional assignment may have been too low, or the subsequent conduct of the donee may have developed unsuspected qualities. The purpose of the whole enactment was to assure the legality of these provisional, temporary, acting, assignments, and the particular provision as to the first assignment was merely to make it mandatory that the system should be inaugurated on this

basis. To confine such a useful power within the limits of the first assignment would, in my judgment, violate the whole spirit of the enactment.

Respectfully yours,

T. W. GREGORY.

TO THE SECRETARY OF THE NAVY.

CREDIT UNIONS—INCOME TAX.

Credit unions organized under the laws of the Commonwealth of Massachusetts, being in substance and in fact the same as "co-operative banks * * * organized and operated for mutual purposes and without profit," come within the provisions of the fourth paragraph of section 11 of the Federal income tax act of September 8, 1916 (39 Stat. 766), as exempt from the requirements of said act.

DEPARTMENT OF JUSTICE,
November 3, 1917.

SIR: I have the honor to respond to your communication of August 31, in which you request my opinion upon the following question:

"Are credit unions organized under the laws of the Commonwealth of Massachusetts subject to the income tax imposed by section 10 of Title I, act of September 8, 1916, or do they come within any of the classes specifically enumerated in section 11 of said act as exempt from its requirements?"

The income tax law of October 3, 1913 (38 Stat. 114, 172), provided for the exemption of certain classes of organizations, principally those conducted for the mutual benefit of the individuals belonging to them and where no part of the net income inured to the benefit of any private stockholder or individual. These class exemptions were carried into the income tax law of September 8, 1916, and others were added thereto. The act of October 3, 1913, provided that "domestic building and loan associations" should not be subject to the tax therein imposed, and the act of September 8, 1916, section 11 (39 Stat. 766), provides "that there shall not be taxed under this title any income received by any—

"Fourth. Domestic building and loan association and co-operative banks without capital stock organized and operated for mutual purposes and without profit; * * *"

Thus it will be seen that in addition to "domestic building and loan associations" Congress has specifically exempted from the provisions of said income tax law "cooperative banks without capital stock *organized and operated for mutual purposes and without profit.*"

The similarity between credit unions and cooperative banks, as they exist in Massachusetts, is striking. Having in mind the history of the insertion of the fourth paragraph of section 11 of the income tax law, it must be conceded that although credit unions do not come within the letter of the paragraph, such associations are wholly within the intention and meaning of Congress as therein expressed. Because the words "credit union" were not specifically used is certainly no reason for saying that such organizations are subject to the tax imposed by the act, if on examination of the purpose and object of such associations it appears that they are substantially identical with domestic building and loan associations or cooperative banks "organized and operated for mutual purposes and without profit." It is to be presumed that Congress intended that the general terms used in section 11 should be so construed as not to lead to injustice, oppression, or an absurd consequence. *Holy Trinity Church v. United States*, 143 U. S. 457.

The history of credit unions in the United States is a brief one, the first credit union being organized in Massachusetts in 1910 under the provisions of chapter 419, acts of 1909, and since that time more than 50 credit unions have commenced operations in that State. The legislatures of New York, Wisconsin, and Texas have authorized the establishment of the system. The act of the legislature of Massachusetts, approved May 20, 1915, and now in force, provides that seven or more persons, residents of the State, may form a credit union "for the purpose of accumulating and investing the savings of its members and making loans to members for provident purposes," subject to the ap-

proval and consent of the board of bank incorporation. The board of bank incorporation is authorized to grant such consent when "it is satisfied that the proposed field of operation is favorable to the success of such corporation, and that the standing of the proposed incorporators is such as to give assurance that its affairs will be administered in accordance with the spirit of this act."

The distinctive words "credit union" are reserved to such associations organized in accordance with the provisions of the act. The fundamental principle underlying the system of credit unions is cooperation, each union being a community for that purpose. A credit union is authorized to receive the savings of its members in two ways: Either as payment for shares or on deposit. The by-laws prescribe the conditions of membership, the par value of the shares of stock and the maximum number of shares which may be held by any one member, the conditions on which shares may be paid in, transferred and withdrawn, and the conditions on which deposits may be received and withdrawn.

The act provides that the capital stock of a credit union shall be unlimited in amount, but the par value of shares must not exceed \$10. Share holding is not an essential to membership in a credit union, but simply an attribute of membership. Only the members can subscribe for shares of stock, yet a member may be merely a depositor instead of a shareholder. The association is one of individuals and not of shares, each shareholder being entitled to only one vote, regardless of the number of shares he may own.

The members of the credit union set a limit upon the number of shares or the amount of deposit which a member may have in the association, and thus an individual or group of individuals is prevented from obtaining too dominating an influence or by suddenly withdrawing large sums cause damage to the association.

Loans are made only to members of the credit union, on which a low rate of interest is charged. Applications for loans must be made in writing to the credit committee, and the member applying for a loan must state the purpose for which it is desired, and no loan shall be made unless the

credit committee is satisfied that it promises to benefit the borrower. Loans of very small amounts are made and are repayable in installments. Prompt payment of obligations is a fundamental requirement of these associations.

Summarizing the provisions of the act under which credit unions are organized and conducted, it is apparent that the purpose of these financial associations is to help people to save and to assist those in need of financial help whose credit may not be established at the larger banks. In reality they are fundamentally similar and supplemental to the existing agencies for promoting thrift, namely, the savings banks and cooperative banks, except on a much smaller scale.

As has already been pointed out, share holding is not an essential prerequisite of membership in a credit union—a member may be only a depositor. All members are encouraged to subscribe for shares of the capital stock, which is unlimited in amount, but the number of shares for which a member can subscribe is limited by the by-laws of the association. No certificate of stock is issued to the shareholder, and it seems clear that the term “capital stock” as used in connection with credit unions is in no sense similar to the accepted business meaning of that term, which Congress doubtless had in mind when the words “without capital stock” were inserted in the fourth paragraph of section 11 of the income-tax law.

While in a credit union dividends are paid on shares of stock, it is in reality the same as paying interest on deposits. At the annual meeting of the association each member (shareholder and depositor) has but one vote, and no member can vote by proxy. At this meeting the members may, upon recommendation of the board of directors, declare a dividend from income which has been actually collected during the fiscal year, after certain deductions have been made, but as a practical matter the dividend simply takes the place of interest. Thus, shareholding is only a means of saving and is one of the privileges of membership in the credit union.

I am of opinion, therefore, that credit unions organized under the laws of the Commonwealth of Massachusetts

come within the provisions of the fourth paragraph of section 11 of the income-tax law of September 8, 1916, as exempt from the requirements of said act, because in substance and in fact they are the same as cooperative banks, and while such credit unions have a capital stock, such shares are merely a means to assist the members in accumulating their savings, and in no sense are these associations organized for profit, but on the contrary, come within the language used by Congress in the fourth paragraph of section 11, in that they are "organized and operated for mutual purposes and without profit."

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

IMPORTATION OF DISTILLED SPIRITS.

The Food Control Act of August 10, 1917 (40 Stat. 282), prohibits the importation for any purpose of distilled spirits produced prior to the passage of the War Revenue Act of October 3, 1917 (40 Stat. 300, 308).

Distilled spirits produced after the passage of the War Revenue Act may be imported for other than beverage purposes under such rules, regulations, and bonds as the Secretary of the Treasury may prescribe.

Distilled spirits produced in the West Indian Islands recently acquired from Denmark, if produced from products the growth of those islands and produced after the passage of the war revenue act, may be imported for any purpose, but if produced before the passage of the War Revenue Act their importation for any purpose is prohibited.

DEPARTMENT OF JUSTICE,
November 3, 1917.

SIR: I have the honor to acknowledge receipt of your letter of October 23, 1917, requesting an opinion on certain questions affecting importations of distilled spirits which have arisen under recent legislation relative to such spirits.

The food-control act, approved August 10, 1917, in section 15 (40 Stat. 282), after prohibiting the use of certain materials in the production of distilled spirits for beverage purposes, covers the subject of the importation

of such spirits in one sentence: "Nor shall there be imported into the United States any distilled spirits." The language is comprehensive and unambiguous. Undoubtedly it prohibits the importation of distilled liquors for any purpose, and without regard to where or when produced.

The revenue act approved October 3, 1917 (40 Stat. 300, 308), under the title "War tax on beverages," provides (sec. 300) for an additional tax on distilled liquors, and then (sec. 301):

"That no distilled spirits produced after the passage of this act shall be imported into the United States from any foreign country, or from the West Indian Islands recently acquired from Denmark (unless produced from products the growth of such islands, and not then into any State or Territory or District of the United States in which the manufacture or sale of intoxicating liquor is prohibited), or from Porto Rico, or the Philippine Islands. Under such rules, regulations, and bonds as the Secretary of the Treasury may prescribe, the provisions of this section shall not apply to distilled spirits imported for other than (1) beverage purposes or (2) use in the manufacture or production of any article used or intended for use as a beverage."

This section deals alone with distilled spirits produced *after* the passage of the act. As to these, the prohibition is just as broad and comprehensive as that contained in the Food-Control Act, except that it does not apply (1) to spirits produced from products the growth of the West Indian Islands recently acquired from Denmark and (2) to spirits imported under such rules, regulations, and bonds as may be prescribed by the Secretary of the Treasury for other than beverage purposes.

The question is: To what extent, if any, does the later act repeal the earlier?

There is no repealing clause, and, therefore, there has been no repeal except by implication. It can not be said that the entire provision of the food-control act is repealed unless it appears that the later act *covers the whole subject* of that provision and embraces new provisions

plainly showing that it was intended as a substitute therefor. But the *whole subject* of the food control act provision is the importation of distilled spirits *whenever or wherever produced*, while the subject of section 301 of the revenue act is more limited, being only the importation of such spirits *produced after October 3, 1917*. The latter is undoubtedly embraced in and a part of the former, but certainly does not *cover the whole of it*.

I have no difficulty, therefore, in reaching the conclusion that the whole of the provision of the food control act in question has not been repealed, but that, except to the extent that it is modified by the later act, it is the law. Since the later act does not deal at all with the subject of spirits produced *prior to its passage* the broad prohibition against the importation of such liquors is still in force.

The question then is, to what extent does section 301 modify the prohibition against the importation of spirits produced after October 3, 1917?

Two rules of construction are applicable in determining the answer. (1) So much of the earlier act as is repugnant to the later is repealed. (2) If it is apparent from the face of a later act that the intent is to provide a complete scheme of legislation applicable to the subject dealt with, all provisions of earlier acts on the same subject are repealed.

The subject dealt with in section 301 of the revenue act is not the importation after its passage of distilled spirits, but the importation of such spirits *produced after its passage*. Apparently, it covers the whole field and leaves nothing lacking to make a complete scheme of legislation on that subject. As to spirits produced after its passage, it (1) enlarges the language of the former act so as to remove any doubt as to whether the word "imported" includes shipments from our insular possessions, (2) it introduces an exception in favor of importations from our West Indian Islands, and (3) it makes an exception in favor of importations for other than beverage purposes.

It is, in my opinion, plain, therefore, that section 301 of the revenue act is the law on the subject of the importation

of spirits produced after October 3, 1917, whether that section be regarded as repugnant to or a modification of the earlier law, or as itself providing a complete scheme of legislation on the subject. Under its provisions, spirits (produced after October 3, 1917) may be imported, for whatever purpose, from our West Indian Islands if produced from products the growth of those islands, and such spirits (produced after October 3, 1917), wherever produced, may be imported for other than beverage purposes under such rules, regulations, and bonds as you may prescribe. All other importations of spirits are prohibited by one or the other of the acts.

My conclusions are: (1) The prohibition against the importation of spirits *produced before October 3, 1917*, has not been affected by the enactment of the revenue act, and the importation of such spirits *for any purpose* is unlawful; (2) the importation of spirits *produced after October 3, 1917*, is controlled by section 301 of the revenue act, and, under it, spirits produced after that date may be lawfully imported from our West Indian Islands *for any purpose* if produced from products the growth of those islands; and (3) all distilled spirits produced after that date may be imported for other than beverage purposes under such rules, regulations, and bonds as the Secretary of the Treasury may prescribe.

Accordingly, I reply specifically to the questions submitted as follows:

1. Distilled spirits produced before the passage of the War Revenue Act may not be imported for beverage purposes.

2. Distilled spirits produced before the passage of the War Revenue Act may not be imported for any purpose.

3. Distilled spirits produced after the passage of the War Revenue Act may be imported for other than beverage purposes under such rules, regulations, and bonds as the Secretary of the Treasury may prescribe.

4. Distilled spirits produced in the West Indian Islands recently acquired from Denmark, if produced from products the growth of those islands and produced after the passage of the war revenue act, may be imported for any

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purpose, but if produced before the passage of the War Revenue Act, their importation for any purpose is prohibited.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

EMPLOYEES' COMPENSATION ACT—DR. VON EZDORF.

Dr. von Ezdorf, a surgeon in the Public Health Service, having been appointed by the President by and with the advice and consent of the Senate, was an officer of the United States, and therefore not within the operation of the Federal employees' compensation act of September 7, 1916 (39 Stat. 742), which provides "compensation for employees of the United States suffering injuries while in the performance of their duties."

DEPARTMENT OF JUSTICE,

November 22, 1917.

SIR: I have the honor to acknowledge receipt of your letter of October 29, 1917, inclosing a communication from the chairman of the United States Employees' Compensation Commission and requesting an opinion on the questions therein submitted.

The specific case stated is that Dr. von Ezdorf, a surgeon in the Public Health Service, was engaged in the special work of investigating the suppression and control of malarial fever in Lincoln County, N. C., and to escape a sudden storm ran about 100 yards to a cabin, upon reaching which he dropped dead. The question is, whether compensation can legally be paid to his widow under the Federal compensation act of September 7, 1916 (39 Stat. 742). The answer to this question must depend upon the answer to another, Was he a *civil employee* of the United States?

The act, in section 1, provides broadly that the United States shall pay compensation "for the disability or death of an employee" as specified in that and following sections. And in section 40 it is provided that "the term 'employee' includes all civil employees of the United States and of the Panama Railroad Co." Clearly, the word "civil" was intended to exclude those employed in the military and naval

service. And the question is what civilians in the service of the United States are described by the word "employee." In its broadest sense, an employee is anyone who is engaged in the service of or is employed by another. In this sense, all who serve the Government, from the highest official to a laborer employed by the day, are employees. But usually it is applied only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a corporation or government. In the usual acceptation of the term, it is understood to apply to those, other than officers, in the service of the Government. No one would think of calling a Cabinet officer, a Senator, or a Justice of the Supreme Court an *employee* of the Government. They are all civilians in the service of the Government. They can be distinguished from employees only upon the ground that they are officials or officers and, therefore, not employees as that word is commonly understood. In other words, "there are two classes of public servants, officers, or those whose functions appertain to the administration of Government, and employees, or those whose employment is merely contractual." *Moll v. Sbisà*, 25 South. 141. Ordinarily, without doubt, the term in question is understood as including only the latter class. The most that can be claimed is that it is possible to use that term in a broader sense, and that, therefore, the intent of Congress must be determined from the context and by applying the accepted rules of construction. In the present case, the actual context gives but little, if any, help, for no qualifying words are used. The most that can be said is that the act, as a whole, shows that the chief concern of Congress was those whose compensation was small. No one is excluded because receiving compensation in excess of \$100. But the monthly benefits received are in no case to exceed two-thirds of a salary of \$100 a month.

It is always permissible to consider the sense in which Congress has been accustomed to use a given word. I am not aware that it has ever been held that the term "employee" of the Government in an act of Congress includes officers. And Congress has evidently understood that, if it intended to include officers, it must name them. Thus,

the expression "officers, clerks, and employees" or "officers and employees" occurs in numerous statutes.

In case of ambiguity, the courts look to the debates in Congress for light. In this case, there were elaborate hearings before a committee of Congress. The bill then under consideration provided compensation to employees, but this term was expressly defined as including all "civilian officers and employees." That officers were thus included was the subject of much discussion. And, in the bill as finally reported and passed, the words "officers and" were stricken from this definition, which, as above shown, was made to read simply "all civil employees." It is very clear that this change was the result of the discussion referred to, and I can not doubt that the purpose and intent of Congress was to draw a distinction between mere employees and officers, both of the United States and of the Panama Railroad Co., and to entirely exclude the latter from the benefits of the act.

Dr. von Ezdorf, having been appointed by the President by and with the advice and consent of the Senate, was an officer of the United States (Const. of U. S., Art. II, sec. 2; *United States v. Germaine*, 99 U. S. 508, 509, 510; *United States v. Mouat*, 124 U. S. 303, 307), and therefore not within the operation of the United States employees' compensation act.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE PRESIDENT.

NATIONAL BANKS—FIDUCIARY PERMITS.

The Federal Reserve Board has no authority to grant to national banks located in New York the power to act as trustee, executor, and administrator.

DEPARTMENT OF JUSTICE,
November 26, 1917.

SIR: I have your letter dated November 16, 1917, with reference to the authority of the Federal Reserve Board to grant to national banks located in New York the power

to act as trustee, executor, and administrator. I am of opinion that the reserve board has no such authority under existing laws.

Section 11 (k) of the Federal reserve act of December 23, 1913 (38 Stat. 262, c. 6), empowers the reserve board—

“SEC. 11 (k). To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe.”

The congressional enactment therefore authorizes the special permit only “when not in contravention of State or local law.”

The act of April 16, 1914, Article V, section 223, Laws of New York, 1914, chapter 369, page 1371, provides:

“No corporation other than a trust company organized under the laws of this State shall have or exercise in this State the power to receive deposits of money, securities or other personal property from any person or corporation in trust, or have or exercise in this State any of the powers specified in subdivisions one, four, five, six, seven and eight of section one hundred eighty-five of this article, nor have or maintain an office in this State for the transaction of, or transact, directly or indirectly, any such or similar business, except that a Federal reserve bank may exercise the powers conferred by subdivision one of such section if authorized so to do by the laws of the United States
* * *”

Subdivisions 1, 4, 5, 6, 7, and 8 of section 185 of Article V referred to confer authority upon trust companies to act as registrar of stocks and bonds, as executor and administrator, and as trustee in various capacities.

The laws of New York empower only trust companies organized under the laws of that State to act as trustee, executor, and administrator. This is not a case where the local law simply authorizes State banks to assume trust company functions. *Attorney General v. First National Bank*, 192 Mich. 640. Corporations other than those organized in New York are expressly prohibited from exer-

cising such powers. Since the national banks in question are not organized under the laws of New York, a special permit to act as trustee would be plainly in contravention of the State law.

I find nothing in the opinion of Mr. Chief Justice White in *First National Bank v. Fellows* (244 U. S. 416), which would justify, in the present matter, a different construction of the unambiguous provisions of the controlling statutes. The language of the present Chief Justice demonstrates the power of the National Legislature to confer authority upon national banks to act as trustee, executor, and administrator, where such powers are exercised by State trust companies, even though the State law discriminates against the national agencies in this regard. The power of Congress to determine how far national banks may be subject to State control is settled, and State regulations which conflict with the congressional enactments are invalid. (*Davis v. Elmira Bank*, 161 U. S. 275; *Easton v. Iowa*, 188 U. S. 220; *Van Reed v. National Bank*, 198 U. S. 554.) But in this case Congress has not exerted its power. By section 11(k) it has explicitly constituted the local statutory provisions as the criterion of the corporate capacity of national banks. The New York statute, therefore, can not fairly be said to deny to national banks operating in New York a power Congress intended they should have.

Very respectfully,

T. W. GREGORY.

TO THE PRESIDENT.

WAR RISK INSURANCE.

The privilege of applying for insurance under section 400 of the amendment of October 6, 1917, to the War Risk Insurance Act (40 Stat. 400), is confined to persons in the military or naval service of the United States, including of course their duly authorized representatives.

DEPARTMENT OF JUSTICE,

December 1, 1917.

SIR: I have your letter of November 23, 1917, in which you ask for my opinion as to whether or not dependents

and associations may apply for insurance under the recent War Risk Insurance Act (40 Stat. 398, 409), covering persons in the military or naval service.

You state:

"Section 400 of the act of October 6, 1917 (Public No. 90), entitled 'An act to amend an act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," approved September second, nineteen hundred and fourteen, and for other purposes,"' reads as follows:

"That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of \$500, and not less than \$1,000 or more than \$10,000, upon the payment of the premiums as hereinafter provided."

"This Department proposes to issue regulations under the authority of the foregoing quoted section of the act which will permit a person other than the person to be insured, or an association, to make an application for insurance on behalf of a person in the military or naval service."

Section 400, quoted above, does not specify by whom the application must be made. If, therefore, that section stood alone, it might reasonably be contended that the application could be made not only by every officer, enlisted man, etc., specified in the section (hereafter referred to as persons in the military or naval service), but also by their dependents. For the section expressly states the object to be to give protection not only to persons in the military and naval service but also to their dependents.

But the section does not stand alone. It is closely related to and must be construed in connection with the provisions of the Act which immediately follow.

Section 401 provides in part as follows:

"That such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation, *except that those persons who are in the active war service at the time of the publication of the terms and conditions of such contract of insurance may apply at any time within one hundred and twenty days thereafter and while in such service.* Any person in the active service on or after the sixth day of April, nineteen hundred and seventeen, who, while in such service and before the expiration of one hundred and twenty days from and after such publication, becomes or has become totally and permanently disabled or dies, or has died, *without having applied for insurance*, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of \$25 each." [Italic ours.]

The italicized words tend to the view that Congress contemplated that only persons in the military or naval service of the United States should be entitled to make the application.

Section 402 provides in part as follows:

"That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. The insurance shall not be assignable, and shall not be subject to the claims of creditors of the insured or of the beneficiary. It shall be payable only to a spouse, child, grandchild, parent, brother or sister, and also during total and permanent disability to the injured person, or to any or all of them * * *. Subject to regulations, the insured shall at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries, but only within the classes herein provided."

The last clause of this provision strongly indicates that Congress did not intend to authorize applications by any but the persons to be insured. It expressly gives the in-

sured—namely, the person in military or naval service—the right at all times “to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries.” Such a right in the insured is not easy to reconcile with the view that section 400 authorizes others to apply for insurance. For it is hardly reasonable that Congress would give that right and at the same time give the insured the right to change the beneficiaries without their consent.

So far as the history of the legislation throws any light on the question it tends to confirm the view that Congress contemplated that the application for insurance under section 400 could be made only by persons in the military or naval service.

Majority and minority reports were filed by the committee in charge of the legislation, discussing in detail the objects of the sections dealing with insurance. (Supplemental report of the majority of the committee, Cong. Rec., vol. 55, 65th Cong., 1st sess., pp. 6708–6711; Minority report, pp. 6711–6713.)

The majority report in discussing the insurance provisions of the act says:

“This insurance will enable many a man who, had he remained in civil life, would have prospered and who by reason of his military career has been reduced to the Government compensation, to secure some additional comforts and to give his children the care, maintenance, and education that they would have received had he not entered the military service.

“But to confine the insurance to death within five years after the war would be to frustrate one of the principal objects of this article. That object is to enable the men in military service, by their own efforts and self-denial, to protect themselves against the consequences of old age or of disability or death not caused by their military service.” (Cong. Rec., vol. 55, 65th Cong., 1st sess., p. 6709.) * * *

The bill, however, very properly contemplates that if the insurance is taken within the limited period of 120 days, during which a man must make up his mind whether or

not he desires to obtain this protection, it may be kept up after the war even though the insured be healthy and return to civil life." (Cong. Rec., vol. 55, 65th Cong., 1st sess., p. 6709.) " * * * The strenuous objection to Article IV seems clearly to be based upon objection to any real governmental insurance as harmful to the private companies. This fear, in our judgment, is without justification; but even if it were fully justified, no private interest should be permitted to stand in the way of the Government doing justice to its fighting forces. To them alone this insurance is confined. The bill does not contemplate any extension beyond this limited class." (Cong. Rec., vol. 55, 65th Cong., 1st sess., p. 6710.)

The minority report sums up the insurance provisions as giving:

"The right to every soldier and sailor to insure himself with the United States against death or total disability for \$1,000 to \$5,000." (Cong. Rec., vol. 55, 65th Cong., 1st sess., p. 6711.)

In commenting in more detail upon the provisions of the bill the minority report says:

"The bill provides that the United States shall sell insurance to any soldier or sailor against death or total disability for not less than \$1,000 nor more than \$5,000." (Cong. Rec., vol. 55, 65th Cong., 1st sess., p. 6713.)

" * * * It is assumed that only a few will take out insurance; if so, these few will get advantage over their fellows; who will certainly insist that the discrimination shall be remedied and that they shall be assumed to have taken out policies, as this bill itself does as to men who die before the insurance plan is promulgated." (Cong. Rec., vol. 55, 65th Cong., 1st sess., p. 6713.)

In the debates in Congress it was generally recognized by both the advocates and opponents of the legislation that its insurance provisions were designed:

"To provide an insurance system for all such soldiers and sailors as may elect to avail themselves of it at a very low cost." (Cong. Rec., daily issue, vol. 55, 65th Cong.,

1st sess., p. 8087; see also to same general effect, pp. 7305, 7577, 7614, 7627, 7680, 7739, 7743, 7754, 8409, 8475.)

An extensive examination of the debates in Congress discloses no suggestion that Congress contemplated that the application for insurance could be made by others than those in the military and naval service of the United States.

Furthermore, the estimates as to the expense to the United States involved in the insurance plan were based upon the understanding that many of those persons in such service would not avail themselves of the opportunity to insure at all, or at any rate, not to the full amount. (Cong. Rec., daily issue, vol. 55, 65th Cong., 1st sess., pp. 7739, 7754, 8475.)

Concerning this phase of the matter Senator Simmons said:

"While the soldier who has a wife and children would likely take out as much as he feels able to take out, probably in many instances as much as the law will permit him to take out, that large class of soldiers who have no wife and no children would likely do just as the man in civil life who has neither wife nor children, take out but little if any insurance; and therefore those who would take out insurance to the maximum, whether it be \$7,500 or \$10,000, would be that small class of soldiers who have left behind them dependent families or parents." (Cong. Rec., vol. 55, 65th Cong., 1st sess., p. 7748.)

Without going into further detail it is my opinion that the privilege of applying for insurance under section 400 is confined to persons in the military or naval service of the United States, including, of course, their duly authorized representatives. It follows that the particular regulations transmitted are not within the law, being framed on the theory that others can make the application.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

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TAX ON DISTILLED SPIRITS.

Distilled spirits held by manufacturers and intended not for sale as spirits but for manufacture into nonbeverage products are not subject to taxation under section 303 of the War Revenue Act of October 3, 1917 (40 Stat. 309).

DEPARTMENT OF JUSTICE,
December 13, 1917.

SIR: I have the honor to acknowledge the receipt of your request of November 9, 1917, for my opinion with respect to the construction of section 303 of the act of October 3, 1917, "to provide revenue to defray war expenses, and for other purposes" (40 Stat. 309).

The section is as follows:

"SEC. 303. That upon all distilled spirits produced in or imported into the United States upon which the tax now imposed by law has been paid, and which, on the day this Act is passed, are held by a retailer in a quantity in excess of fifty gallons in the aggregate, or by any other person, corporation, partnership, or association in any quantity, and which are intended for sale, there shall be levied, assessed, collected, and paid a tax of \$1.10 (or, if intended for sale for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of \$2.10) on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon: *Provided*, That the tax on such distilled spirits in the custody of a court of bankruptcy in insolvency proceedings on June first, nineteen hundred and seventeen, shall be paid by the person to whom the court delivers such distilled spirits at the time of such delivery, to the extent that the amount thus delivered exceeds the fifty gallons hereinbefore provided."

The specific question submitted is whether distilled spirits which are held with a view to use "in the manufacture of an article wherein the spirits lose their identity as alcohol and are to be used in this changed form" are liable to the tax of \$1.10 a gallon laid upon "distilled spirits * * * held * * * and * * * intended for sale." In other words, the inquiry is whether the phrase "distilled

spirits intended for sale" embraces not only spirits intended for sale as such, but also other spirits which though not intended for immediate sale are intended for ultimate sale, in that they are first to be used in the manufacture of nonbeverage compositions—medicines, tinctures, extracts, etc.—in which they lose their identity, and these manufactured articles containing the spirits are then to be sold.

There is plainly a distinction in the ordinary acceptation of the language between a thing intended for sale and a thing intended for use in manufactures. A sale of an agricultural implement, for example, in which lumber forms a constituent part can not in any proper sense be called a sale of lumber. Neither is a sale of a purely medicinal compound, even though it contains alcohol as an ingredient, a sale of alcohol within the ordinary meaning of language. There is nothing in the law in question to warrant a supposition that the phrase "intended for sale" was meant to have any wider scope than the words naturally import. On the contrary, it is clear that Congress recognized a distinction between spirits "intended for sale" and spirits "intended for use in manufacture," for it will be observed that in laying the tax of \$2.10 on distilled spirits designed for beverage purposes care was taken to include by express language not only spirits "intended for sale for beverage purposes" but also spirits intended "for use in the manufacture or production of any article used or intended for use as a beverage." Whether the spirits are intended for sale in an unchanged form for beverage purposes or are intended for use in the manufacture of potable products, they must in any event pay the tax of \$2.10 a gallon. Equal particularity would have been possible with respect to nonbeverage spirits had Congress intended to lay a tax of \$1.10 upon them regardless of whether they were intended for sale as such or for use in manufactures. The fact that spirits of the latter description were not expressly included, in my opinion, indicates that it was not the Congressional intention to include them.

This conclusion is confirmed by the general rule of statutory construction that a tax is not to be extended by im-

plication beyond the plain meaning of the language imposing it. (*Sutherland, Statutory Construction*, sec. 363, pp. 462-463; *Cooley, Taxation*, 2d ed., pp. 274-275.)

For the reasons stated, I agree with the view expressed by the Solicitor for the Treasury Department in his memorandum of November 8, 1917, accompanying your letter, that distilled spirits held by manufacturers and intended not for sale as spirits but for manufacture into nonbeverage products, are not subject to taxation under section 303 of the War Revenue Act.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

IMPORTATION OF ALCOHOL FROM PORTO RICO.

The importation of alcohol from Porto Rico is absolutely prohibited, if produced *prior* to the passage of the War Revenue Act of October 3, 1917.

Alcohol produced *after* the passage of the War Revenue Act of October 3, 1917, may be brought into the United States from Porto Rico free of duty, but under such rules, regulations and bonds as the Secretary of the Treasury may prescribe, and may then be withdrawn *free of tax* for denaturation for any of the purposes for which domestic alcohol may be withdrawn free of tax from a distillery or distillery warehouse.

DEPARTMENT OF JUSTICE,

December 20, 1917.

SIR: I have the honor to acknowledge receipt of your letter of December 6, 1917, requesting an opinion on the following questions: (1) May alcohol be brought to the United States from Porto Rico for denaturation *free of tax* if produced after the passage of the war revenue act, approved October 3, 1917 (40 Stat. 300)? (2) may alcohol be brought to the United States from Porto Rico for denaturation *free of tax* if produced prior to the passage of the war revenue act?

1. In accordance with the views expressed in the opinion rendered you November 3, last, my conclusion is that the importation of all distilled spirits produced *prior* to the passage of the war revenue act of October 3, 1917, is abso-

lutely prohibited regardless of whether, if imported, it would be taxable or not. Your second question must therefore be answered in the negative.

2. For the reasons stated in the same opinion, distilled spirits produced *after* the passage of the war revenue act of October 3, 1917, may be imported for other than beverage purposes under such rules, regulations and bonds as you may prescribe. It follows that distilled spirits produced after that date may be lawfully imported from Porto Rico for the purpose of being denatured under such rules, regulations and bonds as you may prescribe. The only question is whether they may be admitted *free of tax*.

Merchandise coming into the United States from Porto Rico is not subject to the tariff or customs duties. But "upon articles of merchandise of Porto Rican manufacture coming into the United States *and withdrawn for consumption or sale*" there is "a tax equal to the internal-revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture." Section 3 of the Foraker Act of April 12, 1900 (31 Stat. 77).

Alcohol of domestic manufacture is subject to an internal-revenue tax payable when it is withdrawn from distilleries or distillery warehouses for consumption or sale. It follows, therefore, that alcohol of Porto Rican manufacture, though admitted free of duty, is subject to the same tax and only the same tax payable when it is withdrawn for sale or consumption to which domestic alcohol is subject when withdrawn from a distillery or distillery warehouse. But under the act of June 7, 1906 (34 Stat. 217), domestic alcohol may be withdrawn from distillery warehouses for denaturation for certain specific purposes free of tax. It is clear then that Porto Rican alcohol may likewise be withdrawn for denaturation for the same purpose free of tax.

I therefore advise that alcohol may be brought into the United States from Porto Rico free of duty, but under such rules, regulations, and bonds as the Secretary of the Treasury may prescribe, and may then be withdrawn *free of tax* for denaturation for any of the purposes for which domes-

tic alcohol may be withdrawn free of tax from a distillery or distillery warehouse, provided such Porto Rican alcohol has been produced since the passage of the War Revenue Act.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

REQUISITION OF COTTONSEED CAKE.

Under the provision of section 10 of the Food and Fuel Act of August 10, 1917 (40 Stat. 279), the President has the power, acting through the Food Administrator, to requisition cottonseed cake to be used to preserve the cattle herds of Texas and insure a proper meat supply for the country.

DEPARTMENT OF JUSTICE,

January 2, 1918.

SIR: I have your letter of November 28, 1917, requesting my opinion upon the question whether the President, through the United States Food Administrator, has the power under the act approved August 10, 1917, commonly known as the Food and Fuel Act, to requisition certain cottonseed cake under circumstances stated by the Food Administrator as follows:

"At the present time there is a great shortage of cattle feed in the western part of Texas, to such an extent that the cattle in that region are dying of starvation in spite of every effort made to preserve them. There is now in storage at Texas Gulf points approximately 15,000 tons of cottonseed cake, a valuable feed, which was destined for shipment to neutral countries but for which an export license has been refused. Under the circumstances, it is essential that this feed should be used immediately to preserve the cattle herds of Texas and insure a proper meat supply for the country. We are endeavoring to reach an agreement with the owners of this feed, but up to date they have refused to sell.

"The question which I wish to submit to the Attorney General is whether the President, acting through the

United States Food Administrator, has power to requisition this feed. From time to time it is probable that other situations will arise requiring the immediate disposition of foodstuffs held in storage."

The provision of the act which it is suggested confers the power to requisition this feed under the circumstances stated is found in section 10 (40 Stat. 279), as follows:

"That *the President is authorized*, from time to time, *to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense*, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor." (Italics mine.)

As the cattle to feed which it is proposed to seize the cottonseed cake are private property, it seems obvious that the requisition would not be a requisition of feed necessary "to the support of the Army or the maintenance of the Navy," within the meaning of the provision quoted. The question to be determined, then, is whether the proposed requisition is necessary for "any other public use connected with the common defense."

The motive and purpose of the act are explained by the provisions of section 1 (40 Stat. 276):

"That by reason of the existence of a state of war, *it is essential to the national security and defense*, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, *to assure an adequate supply and equitable distribution * * * of foods, feeds, and fuel*, hereafter in this Act called necessities; to prevent locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement; *and to establish and maintain governmental control of such necessities during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and prescribed.*" (Italics mine.)

clude officers is manifest. But the word "officer" is not always used in precisely the same sense, and has been held in construing some statutes to include persons who under other statutes are held not to be within its meaning. *United States v. Mouat*, 124 U. S. 303, 307; *United States v. Hendee*, 124 U. S. 309. Hence, I do not think it was the intention to include all who might in any sense be called employees, or, on the other hand, to exclude all who might in any sense be called officers. The fair and reasonable construction of the act is that it excludes those who are, strictly speaking, officers, and includes all other civilians in the public service.

Some of the things essential to constitute one an officer in this sense have been settled by judicial decision. Article II, section 2, of the Constitution provides that the President—

"shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

The Supreme Court has said:

"Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States." (*United States v. Mouat*, 124 U. S. 303, 307.)

It may be assumed, therefore, that any person in the service of the Government not appointed by the President, a court, or a head of a department, and not elected, is an employee within the meaning of the act in question. If the converse of this be true, the inquiry could end with the statement that every person appointed by the President or a Cabinet officer, by authority of law, to perform

any service for the Government is an officer and not an employee. And there is language in *United States v. Hartwell*, 6 Wall. 393, which appears to give some justification to such a statement. But an examination of that case, I think, will show that it simply holds that a person appointed, with the approbation of the Secretary of the Treasury, in the office of the Assistant Treasurer of the United States, and charged with the care and duty to keep safely public funds is an officer and not a mere employee, though called a clerk. Being appointed in one of the ways in which an officer may be appointed, the decisive question was whether he was appointed to himself perform some of the functions recognized by law as appertaining to an office, or only to render assistance to an officer in the performance of those functions. The chief function of the office of treasurer of the United States is to care for and keep safely public moneys. When these duties became too heavy for one man to discharge they were divided and a part of them devolved upon an assistant treasurer. The latter did not merely assist the treasurer in the performance of his duties, but himself took over the discharge of some of those duties. It can scarcely be doubted that this was the creation of a new office. And so when the law authorized the appointment of another person who should himself perform some of the duties of the assistant treasurer by caring for and keeping safely, for a time, part of the public funds, it could very well be said that still another office was created. But if the appointment had been of a stenographer to assist the assistant treasurer by writing, at his dictation, his official letters, it would hardly be contended that such person held an office. I think that the true rule is that while Congress is without power to create an office and provide for its being filled except in the manner provided in the section of the Constitution quoted, it may, without creating an office, authorize the President or a Cabinet officer to contract for service to be rendered or to employ any person for that purpose. Where the appointment, therefore, is made in one of the ways by which, under the Constitution, an officer may be appointed, the inquiry must

always be into the nature of the service to be rendered. If the appointee himself performs any of the functions of government, he is an officer. If he merely renders assistance to another in the performance of those functions, he is an employee. Thus section 363 of the Revised Statutes authorizes the Attorney General to "employ and retain" such attorneys and counsellors at law as he may think necessary to assist the district attorneys in the discharge of their duties. The Court of Claims has held that one employed under this act is not an officer. *Wilson v. United States*, 11 Ct. of Cl. 568. And in *United States v. Rosenthal*, 121 Fed. 862, it was held that a lawyer retained, under similar authority, to assist in the trial of a case and commissioned as a special assistant to the Attorney General, is not an officer, though a contrary view seems to have been expressed in 28 Ct. of Cl. 501. It is not necessary now to inquire whether one retained to render professional services, though not an officer, is an employee within the meaning of this statute.

An assistant United States attorney is appointed by the Attorney General, and hence there is nothing in the manner of his appointment to prevent his being an officer in the strictest sense. The question then is, is he appointed to an office or only employed? The authority for his employment is found in 29 Stat. 181, as follows:

"That whenever, in the opinion of the district judge of any district or the chief justice of any Territory and the district attorney, evidenced by writing, the public interest requires it, one or more assistant district attorneys may be appointed by the Attorney General; but such opinion shall state to the Attorney General the facts as distinguished from conclusions, showing the necessity therefor. Such assistant district attorneys shall be paid such salary as the Attorney General may from time to time determine as to each, which shall in no case exceed two thousand five hundred dollars per annum: * * *.

"The Attorney General is authorized to fix and declare the place of the official residence of the district attorney and of each of his assistants: *Provided*, That the said assistants must be residents of the district for which they

are appointed." (29 Stat. 181; Comp. St. Ann., sec. 1420, vol. 2.)

The chief functions of a district attorney are to conduct proceedings in the grand jury room and prosecutions in the court. When they become too heavy for one man, the Attorney General is authorized to appoint an assistant district attorney. He is not appointed merely to assist the district attorney in the discharge of his duties. He is appointed an assistant district attorney and takes upon himself the discharge of some of the duties that would otherwise be discharged by the district attorneys. When he appears in the grand jury room or in court he appears with precisely the same authority the district attorney would have if present. Clearly, Congress has created an office to be filled by the Attorney General when required by the public needs, and the incumbent is an officer in the strictest sense.

I am, therefore, of opinion that an assistant United States district attorney is not an employee within the meaning of the Act referred to.

Respectfully,

T. W. GREGORY.

TO THE PRESIDENT.

WAR-RISK INSURANCE ACT—REPEAL OF GRATUITY LAWS.

Section 312 of the act of October 6, 1917 (40 Stat. 408), which is an amendment to the War Risk Insurance Act, repealed the act of October 6, 1917 (40 Stat. 392), providing for the payment of six months' gratuity to the widow, children, or other dependents of a deceased officer or enlisted man of the Navy or Marine Corps, except in so far as rights under the latter act may possibly have accrued between the time of its approval and the time of the approval of the former act on October 6, 1917.

DEPARTMENT OF JUSTICE,

January 9, 1918.

SIR: I have your letter of November 7, 1917, in which you ask my opinion on the following question arising in the administration of your Department:

"Does the amendment of October 6, 1917, to the war-risk insurance act of September 2, 1914 (Public No. 90, 65th

Cong.), repeal, suspend, or otherwise render inapplicable to persons in the naval service of the United States the paragraph of the Naval appropriations act of August 22, 1912 (37 Stat. 329), as amended by the act of March 3, 1915 (38 Stat. 938), and by the act of October 6, 1917 (Public No. 74, 65th Cong.), which provides for the payment of six months' gratuity to the widow or children, or other previously designated dependent relative of a deceased officer or enlisted man of the Navy or Marine Corps?"

A consideration of the statutes involved discloses the following situation:

By the act designated Public, No. 74, approved October 6, 1917 (40 Stat. 392), it was provided that the act of August 22, 1912—

"as amended by the Act of March third, nineteen hundred and fifteen, which provides for the payment of six months' gratuity to the widow or children or other previously designated dependent relative of a deceased officer or enlisted man on the active list of the Navy and Marine Corps, be, and the same is hereby, amended by inserting after the words 'on the active list of the Navy or Marine Corps' a comma and the words 'or of any retired officer or enlisted man serving on active duty during the continuance of the present war.'"

This act of August 22, 1912, as amended by the act of March 3, 1915, and by Public No. 74, will now read, in its pertinent parts, as follows:

"Hereafter immediately upon official notification of the death, from wounds or disease not the result of his own misconduct, of any officer or enlisted man on the active list of the Navy or Marine Corps, *or of any retired officer or enlisted man serving on active duty during the continuance of the present war* [italicized portions added by Public No. 74], the Paymaster General of the Navy shall cause to be paid to the widow, and, if no widow, to the children, and, if there be no children, to any other dependent relative of such officer or enlisted man previously designated by him, an amount equal to six months'

pay at the rate received by such officer or enlisted man at the date of his death."

[The amendment of March 3, 1915, struck out at this point a provision of the original statute which provided that certain deductions for funeral expenses should be made from these gratuities, 38 Stat. 938.]

The first paragraph of section 312 of the war risk insurance act, as amended, designated Public No. 90 (40 Stat. 408), which like Public No. 74 was approved on October 6, 1917, provides:

"The laws providing for gratuities or payments in the event of death in the service and existing pension laws shall not be applicable after the enactment of this amendment [act] to persons now in or hereafter entering the military or naval service, or to their widows, children, or their dependents, except in so far as rights under any such law shall have heretofore accrued."

The records of Congress show that these two acts—Public No. 74 and Public No. 90—were before that body at the same time, and the acts themselves show that they were approved by the President on the same day. The Congressional Record further shows that Public No. 74 was passed first, and the records of the Executive offices show that it was also the first to receive the President's signature.

Inasmuch as Public No. 74, the first act—the act of August 22, 1912, as amended—provides "for gratuities or payments in the event of death in the service" of certain designated officers and enlisted men, and Public No. 90, the second act—the war risk insurance act as amended—declares that "the laws providing for gratuities * * * shall not be applicable after the enactment of this amendment [act] to persons now in or hereafter entering the military or naval service, or to their widows, children, or their dependents, except in so far as rights under any such law shall have heretofore accrued," there is in terms an inconsistency between these provisions of the two statutes. Nor is the inconsistency removed by the saving clause at the end of the first paragraph of section 312 of the War Risk Insurance Act, namely, "except in so far as rights

under any such law shall have heretofore accrued," for the exception merely covers cases where a right had accrued prior to the taking effect of Public No. 90, e. g., where death had already occurred, whereas the provisions of Public No. 74 are clearly prospective and apply to every "officer or enlisted man on the active list of the Navy or Marine Corps, or of any retired officer or enlisted man serving on active duty *during the continuance of the present war.*"

It results that unless the inconsistency between the two acts can be overcome and their provisions harmonized, one of them must fall.

By old and well established canons of construction it is settled that every effort should be made—in the absence of express words of repeal—to harmonize seemingly conflicting provisions in statutes in *pari materia* passed at the same time, or approximately the same time, even though one of the acts contains language which, in ordinary circumstances and except for the element of contemporaneity, would be deemed to displace the other. The presumption that in such cases the legislature did not intend any inconsistency, no doubt has special force in the case of statutes passed on the same day, and it is entirely clear that such statutes ought, if possible, to be so construed as to allow both of them to stand, for, as was said by the Supreme Court of Maine in *Stuart v. Chapman*, 104 Me. 17, 23, in discussing a situation similar to the one here presented—

"It avoids the absurdity of holding that the legislature, whose proceedings are presumed to be conducted with wisdom and deliberation, enacted and repealed a statute upon the same day; or that the house and senate gravely and solemnly passed through all their several stages two inconsistent acts, either one of which would repeal the other, and sent them at the same time to the governor, intending that, and that alone, should become a law of the land to which he happened last to affix his signature."

With respect to the two statutes now under consideration, however, the earlier enactment, Public No. 74, providing for gratuities in certain cases, falls within the very

letter of section 312 of the later act, Public No. 90, declaring that after its enactment existing gratuity laws shall be inapplicable.

No canon of construction can produce concord between declarations so diametrically opposed. It is not possible to obey Public No. 74 and pay the gratuities which it provides for in the event of death in the service during the continuance of the present war, and at the same time to obey the requirement of section 312 of Public No. 90 and refuse such gratuities. To obey one provision is to ignore the other; to disobey one is to give effect to the other. Since the two provisions state directly opposite requirements and the mandate of one is the prohibition of the other, it is not possible either to obey or to disobey them both.

It seems to me illusory to argue that effect can be given to both by treating Public No. 74 as if it were a proviso to be read into section 312 of Public No. 90 by way of an exception in favor of the persons dealt with in Public No. 74. Such a construction would give complete operation to Public No. 74 but would render nugatory a part of Public No. 90—the later act. This is not giving effect to both. There is, then, as I see it, no escape from the conclusion that the two provisions are irreconcilable. Effect can be given to one or the other but not to both.

Facing this dilemma, the question arises, Which of the provisions, under the facts disclosed, is now law?

In my opinion, the true solution is to be found in the circumstance that the President approved Public No. 74 before he approved Public No. 90. Public No. 90, being the later expression of the legislative will and directly opposed to Public No. 74, must be held to prevail over it, notwithstanding this view requires the consideration of fractions of a day. It is well settled that the courts will look to the precise moment when an act takes effect, provided it becomes material to do so and the facts are ascertainable. *Combe v. Pitt*, 3 Burr. R., 1423, 1434; *In the matter of Joseph Richardson*, 2 Story 571, 580; *Burgess v. Salmon*, 97 U. S. 381, 382–384; *Louisville v. Savings Bank*, 104 U. S. 469, 475–479; *United States v. Stoddard, Hase-*

rick, Richards & Co., 89 Fed. 699, 701; *Leidigh Carriage Co. v. Stengel* (C. C. A. 6th), 95 Fed. 637, 641; *Davis v. Whidden*, 117 Cal. 618.

In *Davis v. Whidden*, *supra*, where two conflicting statutes of the same date were under consideration, the Supreme Court of California, holding that the act last approved by the governor must prevail, determined which was the last by inference from the order in which they were numbered and printed in the statute book and by information obtained from the office of the Secretary of State, saying (p. 623):

“Resorting for aid to the office of the secretary of state, we learn that the County Government Act was in fact last approved by the governor, and was filed in the office of the secretary of state some hours after the filing of the Clark Road Law.”

In the present instance we have not only the inference to be drawn from the numbering of the acts, but the information from the Executive offices that Public No. 90 was in fact approved subsequently to Public No. 74.

In *Gardner v. The Collector*, 6 Wall. 499, there was under consideration a statute which, while showing the day of the month did not show the year in which it was approved, and the question was to what sources the court might look for information on that point. The court stated the rule as follows (p. 511):

“We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule.”

The principle being once granted that the precise time may be taken into account at which the two acts were approved on October 6, 1917, it would seem to follow that No. 74 was just as effectually displaced by No. 90—in view

of the irreconcilable conflict between them—as it would have been if approved, say, a year previously instead of only a few minutes or hours. The material considerations in such cases are (1) that the provisions of the two acts are such that they are inherently incapable of standing together, and (2) that one of the acts is shown to have been finally enacted, *i. e.*, approved, after the other.

If it be suggested that the controlling effect thus given to the sequence of the statutes overlooks the doctrine by which enactments so near together in point of time would ordinarily be treated as contemporaneous (since a case where they are literally so in a mathematical sense would hardly arise, and we do nevertheless have instances of contemporaneous acts), the answer is that the rule which treats acts or events as concurrent which are not so in reality is a mere rule of convenience or necessity—applicable where rights do not depend upon the sequence or in cases where the sequence can not be determined as a fact.

But assuming that the two acts must be viewed as concurrent, why should full effect be given to No. 74 rather than to No. 90, when it is No. 90 which contains express words of repeal of other acts covering the same subject matter, and when by giving effect to No. 90 the irrational and unjust result would be avoided of continuing in force the laws providing gratuities in the case of the death of persons in the naval service and of repealing similar laws relating to persons in the Army? It would seem more logical and more in the interest of justice to regard them as earlier and later sections of the act, in the order of their numbers, the higher number to prevail as the later section, as in the case of conflicting sections of deeds and other instruments. *Sutherland, Statutory Construction*, sec. 220; *Potter's Dwar. Stat.* 132; *United States v. Jackson*, 143 Fed. (C. C. A.) 783; *Woodring v. McCaslin*, 104 N. E. (Ind.) 759, 761; *State v. Mulhern*, 6 Amer. & Eng. Ann. Cas. 856, note, 860-861. As *Sutherland* says, "Slight circumstances preponderate when a question is at equipoise" (*Statutory Construction*, sec. 220, p. 293).

The rule of construction according to which a seeming conflict between general and specific provisions of statutes

will be resolved so as to make the particular and specific terms prevail over those which are more general can hardly have application here, for conceding that the rule is entitled to special consideration in the case of statutes passed at the same time and that Public No. 90 because it deals with compensation on a broader scale and with respect to a larger number of persons than does No. 74 is to be regarded as the more general of the two acts, the fact remains that the relevant language of No. 90, which declares existing gratuity laws inapplicable after its enactment to persons in the military and naval service and their widows, children, and other dependents, is just as specific as the language of Public No. 74 which confers gratuities.

There is, moreover, a countervailing principle according to which, in case of doubt, legislation which obviously embodies a comprehensive program or legislative policy, as does the War Risk Insurance Act (Public No. 90), takes precedence over enactments of a more limited and partial character, whatever the order of their passage, assuming always that the latter act does not contain express language which repeals the earlier.

For the reasons herein stated I am of opinion that your inquiry is to be answered by the statement that Public No. 90 renders Public No. 74 inapplicable (except in so far as rights under the latter may possibly have accrued between the time of its approval and the time of the approval of Public No. 90 on October 6, 1917) to persons in the naval service or to their widows, children, or other dependents.

This view preserves harmony in the general scheme of compensation as provided by the War Risk Insurance Act and at the same time avoids the anomaly and injustice of continuing in effect the laws providing gratuities in the case of death of persons in the naval service while repealing the similar laws relating to persons in the Army.

I am further constrained to the conclusion stated by the consideration that thereby the question is not foreclosed but still remains open for judicial determination, for persons claiming benefits under Public No. 74 can, upon being denied them by the administrative branch of the Govern-

ment, resort to the Court of Claims for an adjudication of their rights.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE NAVY.

INCOME TAX ON STOCK DIVIDENDS.

As there is not a plain and obvious conflict between the provisions of the Constitution and the provisions of the income-tax acts of September 8, 1916 (39 Stat. 756, 757, 766), and of October 3, 1917 (40 Stat. 329, 337, 338), levying an income tax on stock dividends payable out of earnings accrued since March 1, 1913, it is the duty of the administrative officer to comply with the provisions of the statute, leaving the question of its constitutionality to be determined by the courts.

The decision in *Towne v. Eisner* (245 U. S. 418) does not justify an administrative officer in setting aside and disregarding the present statute levying an income tax on stock dividends, since that decision does not in terms decide that Congress has not the power expressly to tax as income stock dividends of the character described in the present statute, although it did determine that the word "income" as used in the income-tax act of October 3, 1913, could not be taken to include stock dividends which had been declared from surplus profits earned prior to the taxing year and prior to the ratification of the sixteenth amendment to the Constitution.

DEPARTMENT OF JUSTICE,

January 26, 1918.

SIR: In your letter of the 18th instant you refer to the opinion of the Supreme Court in the case of *Towne v. Eisner*, decided January 7 last, and request my opinion whether, having in mind the rule of law laid down therein relative to stock dividends, Congress had the power under the provisions of the Constitution to enact the provisions contained in the income-tax acts of September 8, 1916 (39 Stat. 756, 757, 766), and October 3, 1917 (40 Stat. 329, 337, 338), levying an income tax on stock dividends payable out of earnings accrued since March 1, 1913.

The said act of September 8, 1916, after levying, by section 1, paragraph (a), a tax upon the entire net income received within the preceding calendar year by certain

persons, enacted by section 2, paragraph (a), that said net income should include income derived from dividends—

“Provided, That the term ‘dividends’ as used in this title shall be held to mean any distribution made or ordered to be made by a corporation, joint-stock company, association, or insurance company, out of its earnings or profits accrued since March 1, 1913, and payable to its shareholders, whether in cash or in stock of the corporation, joint-stock company, association, or insurance company, which stock dividend shall be considered income, to the amount of its cash value.”

A similar provision was contained in section 31, paragraph (a) of the act of October 3, 1917, except as to the extent to which said stock dividends should be considered income.

The question propounded, therefore, is whether Congress had the constitutional power thus expressly to make stock dividends taxable to the extent provided in the said acts.

In 10 Op. 56, 61, Attorney General Bates used the following language:

“4. The fourth question concerns the power of an Executive Department to examine and decide upon the validity of an act of Congress, and to disregard its provisions.

“There may possibly arise cases of plain and obvious conflict between the provisions of the Constitution and the provisions of a statute. In such cases, there is no room for construction, no ground for argument; and in all such cases, not only the judiciary Department, but every Department, and indeed every private man who is required to act upon the subject matter, must determine for himself what the law of the land, as applicable to the case in hand, really is. He must obey the law, the whole law; and if the conflict between the Constitution and the act of Congress—the higher and the lower law—be plain and unquestionable, he must, of necessity, disregard the one or the other. He can not disregard the Constitution, for that is the supreme law; and therefore he must obey the Constitution, even though, in doing so, he must disregard a statute. The Constitution is the highest and strongest law of all, and there-

fore the lower and weaker law must yield to it in every case, before every tribunal, high or low, judicial or executive. This is predicated of cases where the conflict of law is plain and obvious. But in cases in which the conflict of law is doubtful, and its existence has to be made out by argument, I think it is far more prudent for the administrative officer to follow the statute, and leave the party who may be dissatisfied with the decision to seek his remedy in the courts. * * *

I concur in the view thus expressed that, unless the conflict between the law in question and the Constitution be plain and obvious, it is the duty of the administrative officer to comply with the provisions of the statute, leaving the question of its constitutionality to be determined by the courts.

In the present case such conflict as may exist between the statute and the Constitution is one not apparent upon the face of the former but requiring to be made out by argument. A provision of very much this same nature was sustained by the Supreme Court of the United States in relation to the Civil War income tax act in *Collector v. Hubbard*, 12 Wall. 1, 18, and in *Bailey v. Railroad Company*, 22 Wall. 604, 636, 637, D. C. 106 U. S. 109, 112, 113. The decision in *Towne v. Eisner* determined that the word "income" as used in the act of October 3, 1913, could not be taken to include stock dividends, which, it is to be noted, had been declared in that case from surplus profits earned prior to the taxing year and prior to the ratification of the sixteenth amendment. Whatever inferences may be drawn from this decision, it does not in terms decide that Congress has not the power expressly to tax as income stock dividends of the character described in the present statute. In the absence of such an explicit declaration, I am of the opinion that the matter is not so clear as to justify an administrative officer in setting aside and disregarding an express enactment of Congress.

Very respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE SECRETARY OF THE TREASURY.

SOVEREIGNTY OVER SWAN ISLANDS.

The United States has never acquired sovereignty of any kind or to any extent over the Swan Islands in the Caribbean Sea by reason of the provisions of the Guano Islands Act of August 18, 1856 (11 Stat. 119).

The United States Government may at any time assert its sovereignty over the Swan Islands by appropriate action and no other country has any proper claim to these islands.

The property rights of the Swan Island Commercial Co. in the Swan Islands are dependent upon the assumption of sovereignty over these islands by the United States Government and, upon such assumption, there can be no doubt that the rights of the company in the lands occupied and improved by it will become at least so equitably fixed as to warrant some provision for compensation by the Government.

DEPARTMENT OF JUSTICE,
February 8, 1918.

SIR: I have the honor to reply to your request for an expression of my opinion as to the status of the Swan Islands in the Caribbean Sea with respect to the acquisition of the said islands by the United States Government. Upon the facts appearing from the memoranda and the opinion of the Solicitor of the Navy Department attached to your letter of inquiry, the question directed to this Department divides itself into the following subheads:

1. Has the United States Government acquired sovereignty over the said islands by virtue of the Guano Islands Act of August 18, 1856 (11 Stat. 119; secs. 5570-5578, Rev. Stat.) (Compiled Stat. secs. 3916-3924)?

2. If such sovereignty has not been acquired under and by virtue of the said Guano Islands act, has the United States at the present time the right to extend its sovereignty over the said islands?

3. What title, if any, has the Swan Island Commercial Co., present inhabitants of the said islands, and what, if any, are its property rights therein?

Without reviewing *in extenso* the chain of title from the original discovery and occupation of the said islands to the present date, a brief statement thereof may be made as follows:

The earliest historical record concerning these islands is an affidavit dated June 16, 1857, signed by John Valen-

tine White, who alleged the discovery of guano in these islands in April, 1857, and on the same date, to wit, June 16, 1857, conveyed all his right, title, and interest in and to the said Swan Islands to Charles Stearns, Joseph W. Fabens, and Duff Green, who subsequently incorporated under the name and style of the "Atlantic and Pacific Guano Company," and transferred all their right in and to the said islands to the said company. In compliance with Revised Statutes, section 5574 (act of Aug. 18, 1856, 11 Stat. 119, c. 164), the bond therein required, dated December 30, 1862, was filed some time about February, 1863, by the New York Guano Co., the successors in title of the Atlantic & Pacific Guano Co. through intermediate conveyances. By mesne conveyances the islands came into the possession on July 1, 1902, of the Albion Chemical & Export Co. It appears that this company became insolvent and directed its agent, one Alonzo Adams, to abandon the islands. This he did, not only technically, but actually, physically leaving the islands on February 5, 1904, and taking with him all the inhabitants who were at that time thereon, so that they were actually unoccupied and unclaimed as of the date of February 5, 1904. He returned, however, on the next day, February 6, 1904, and took formal possession in the name of the United States, alleging "The discovery, occupation, and possession by him of the said Swan Islands in the name of the United States," and further alleging that such islands were not at the time of the discovery thereof or of taking possession or occupation thereof by him, in the possession of or occupation of any other government, or of the citizens of any other government, or any other person. Adams retained his possession until November 27, 1908, when he conveyed his rights to the Swan Island Commercial Co. (a corporation organized under the laws of the State of Maine and having a usual place of business in Boston, Mass.), the present occupants. During the fall of 1908 the State Department and the attorney for the Swan Island Commercial Co. exchanged correspondence with respect to perfecting the title of the latter company, and the Department informed the said attorney that he must furnish the bond required

under Revised Statutes, section 5574, and also the data specified in the opinion of the Attorney General (9 Op. 30, June 2, 1857), before the said title could be perfected. The Attorney General had held in the said opinion that the furnishing of the bond and this information was a prerequisite to the exercise by the President of the discretion conferred upon him by Revised Statutes, section 5570, to declare said islands as appertaining to the United States. I am informed that the said bond has never been so filed.

The only action which has been taken by the Government relative to these islands appears to be as follows:

As stated above, a bond covering the Swan Islands was originally given by the New York Guano Co. and filed in 1863. From Moore's International Law Digest, Volume I. page 568, it appears that the islands were included in a list sent out by the Secretary of the Treasury to collectors of customs, under date of February 12, 1869, which list was described as a "corrected list" based upon "the bonds and papers transmitted from the Department of State now on file in the office of the First Comptroller of the Treasury"; a second list reported by the first comptroller to the Secretary of the Treasury, December 2, 1885, was based upon the bonds in his office and included those islands which had been bonded since 1869; a copy of this list was sent to the Secretary of State, July 3, 1890; another copy was communicated by the first comptroller to the Assistant Secretary of the Treasury, September 16, 1893; reduced to one list, the islands that were bonded were shown, and included the Swan Islands, great and little, in the Caribbean Sea, the number and date of the bond being given as No. 10, December 30, 1862. (Moore's International Law Digest, Vol. I, p. 567.)

On November 21, 1894, the Assistant Secretary of the Treasury sent out a circular stating that the "following named Guano Islands," including six therein described (the Swan Islands not being among this number), were considered as stricken from the list, as no longer included along the Guano Islands bonded by the United States under the act of August 18, 1856. On November 28, 1894, the Secretary of the Treasury sent a list of the bonded

islands to the Department of State and asked that it be further revised, so as to include only islands that were then "considered as appertaining to the United States." The Department of State replied that to make such a list would require passing on the rights of a large number of private persons, which it preferred not to do, unless the actions of such persons should render it necessary. A corrected list, however, was given January 18, 1895, as embracing those "that have not been as well as those that have been considered as appertaining to the United States." In this list it is stated as to the Swan Islands that the "proof filed by the New York Guano Co. to secure the protection of the Government for their possession" was "considered sufficient to authorize the Government to extend the protection asked for under the act of August 18, 1856." (Moore's International Law Digest, Vol. I, p. 579.)

It nowhere appears, however, that any executive action was taken by the President, or on his behalf, through the Secretary of State, at any time, which could be construed as an exercise of the discretion conferred upon the President by the act of August 18, 1856, such as to amount to a declaration that the Swan Islands were considered as appertaining to the United States.

As to the first period, i. e., from the date of the original discovery to the abandonment by the Albion Chemical Co. in 1904, it is evident that had the occasion arisen, the President would have been authorized in exercising his discretion and declaring the islands as appertaining to the United States. (See *Jones v. United States* (1890) 137 U. S. 202; *Grafflin v. Nevassa Phosphate Company* (1888) 35 Fed. 474; 9 Op. 30, 364.) If he had done so, however, under the *Grafflin case* no rights of property or title to the same would have been conferred thereby upon the then occupants of the islands. Under the opinion of the Attorney General in the Johnson's Islands case (9 Op. 364) it is apparent that all right and title whatsoever acquired by the discoverer and his successors up to 1904 absolutely ceased and terminated at the time of the abandonment by Alonzo Adams on behalf of the Albion Chemical Co. in that year.

As to the second period, i. e., commencing with the re-discovery and occupation by Alonzo Adams in 1904 and continuing up to the present time, as held *supra* the statute was not sufficiently complied with, so that the President could not have been authorized to exercise his discretion, even if that exercise had been requested (which it was not). The attorney of the present occupant had been duly advised by the Department of State as to the furnishing of the bond and the other data set forth in 9 Op. 30, which were necessary prerequisites to establish even the limited privileges conferred by the Guano Islands act. This the Swan Island Commercial Co. has failed to do, and for that reason it may be said to have no proper claim derived from said act.

Upon the above facts I am, therefore, clearly of the opinion that the United States has never acquired sovereignty of any kind or to any extent over the Swan Islands by reason of the provisions of the Guano Islands act of August 18, 1856 (11 Stat. 119.)

2. HAS THE UNITED STATES THE RIGHT TO EXTEND ITS SOVEREIGNTY OVER THE SWAN ISLANDS BY REASON OF THEIR PAST AND PRESENT OCCUPATION BY CITIZENS OF THIS COUNTRY?

In the case of *Jones v. United States*, 137 U. S. 202, the entire subject as to acquisition of territory by civilized States was carefully considered and the authorities therein cited and discussed. (See also concurring opinion of White, J., in *Downes v. Bidwell* (1901), 182 U. S. 244, 306, 307). On page 212 the following principles were laid down:

“By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines) of territory unoccupied by any other Government or its citizens, the

nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning Guano Islands. Vattel, lib. 1, c. 18; Wheaton on International Law (8th ed.) secs. 161, 165, 176, note 104; Halleck on International Law, c. 6, secs. 7, 15; 1 Phillimore on International Law (3d ed.) secs. 227, 229, 230, 232, 242; 1 Calvo Droit International (4th ed.) secs. 266, 277, 300; *Whiton v. Albany Ins. Co.*, 109 Mass. 24, 31."

This citation may be regarded as expressing the settled policy of international law. (See Moore's International Law Digest, vol. 1, sec. 81, p. 261.) In Dana's Wheaton, the rules are stated as follows:

"Sec. 161. The exclusive right of every independent State to its territory and other property, is founded upon the title originally acquired by occupancy, conquest, or cession, and subsequently confirmed by the presumption arising from the lapse of time, or by treaties and other compacts with foreign States.

"Sec. 162. This exclusive right includes the public property or domain of the State, and those things belonging to private individuals, or bodies corporate, within its territorial limits.

"Sec. 164. The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called prescription, is justly applicable, as between nation and nation; but, the constant and approved practice of nations shows that, by whatever name it be called, the uninterrupted possession of territory, or other property, for a certain length of time, by one State, excludes the claim of every other; in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article or property in question. This rule is founded upon the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him; and the inference fairly to be drawn from his silence and

neglect, of the original defect of his title, or his intention to relinquish it."

From the statement of the facts above referred to, and the documents attached to the letter of the Secretary of Navy, it is apparent that since the period of the original discovery, with the exception of the very slight lapse of time (apparently not 48 hours) between the abandonment of these islands by the Albion Chemical Co. and their so-called rediscovery and settlement by Alonzo Adams in 1904, these islands have always been claimed as occupied by citizens of the United States, and that no other Government has attempted to assert any dominion over them or right and title to any property in them. It further appears from the communication attached to the letter of the Secretary of the Navy that since the rediscovery by said Adams, he and his assignee have continuously occupied and been engaged in operating these islands as guano islands, or further developing them for commercial purposes. The letter of the commanding officer of the U. S. S. *Wheeling*, under date of November 2, 1911, shows that guano had not been worked at that time for several years and was not then being worked, but that the island was being planted by the Swan Commercial Co. in coconuts and that constant shipments were being made on the United Fruit Co's steamers that were regularly calling at the island for that purpose. Furthermore, that the United Fruit Co. maintained a radio station upon the said island, and was on good terms with the Swan Island Commercial Co. Also that the United Fruit Co. owned a small plot of ground on which the wireless station was situated, but no other lands on the island, and its interest therein was solely in maintaining the said wireless station and transporting the products of the island on its steamers. The prospectus addressed to the president of the Swan Island Commercial Co. under date of February 26, 1914, which appears as Exhibit C of the papers attached to the letter of the Secretary of the Navy, sets forth at length the development and commercial possibilities of the islands, together with a financial statement respecting the same.

These facts and circumstances are sufficient in my opinion to warrant the statement that no other country has any proper claim to these islands, and that the United States Government may at any time assert its sovereignty over them by appropriate action. As to the *form* which that action should take, that is a matter for the consideration of the executive and of the legislative branches of the Government, as a political measure relating to acquisition of territory (see *Foster v. Neilson*, 2 Peters 253 (1829); *Garcia v. Lee*, 12 Peters 511 (1838); *United States v. Lynde* (1870), 11 Wall., 632), and not a proper subject upon which this Department should give an opinion.

3. THE TITLE OF THE SWAN ISLAND COMMERCIAL CO.

I do not find any specific cases in which the question of property rights arising from occupation and prescription have been directly passed upon. The situation, however, in all respects, is analogous to the rights of individuals in property upon territory which has been ceded. It has been regarded as a settled principle that an inchoate title to lands is property. *Delassus v. United States*, 9 Pet. 117, 133 (1835); see also *Mitchell v. United States*, 9 Pet. 711, and *Coffee v. Groover*, 123 U. S. 1, 9-10. The duty of protecting such imperfect rights of property rests upon the political department of the United States. *United States v. Chaves*, 159 U. S. 452, 457, 464; *United States v. Santa Fe*, 165 U. S. 675; *United States v. Sandoval*, 167 U. S. 278; *Pueblo of Zia v. United States*, 168 U. S. 198.

The position taken by Secretary of State Bayard respecting the Gilbert Islands affords a helpful analogy. These islands were in 1892 formally declared by Capt. Davis of H. R. M. S. *Royalist* as under British protection. Citizens of the United States had during the preceding 50 years established themselves in the group, and on May 25, 1888, Mr. Adolph Rick was commissioned as United States commercial agent, accredited to the local authority, with residence at Butaritari. At the date of the protectorate Capt. Davis declined to recognize Rick as a consular representative who should be accredited to

the Queen. The United States Government claimed that the germs of civilization were planted in the Gilbert Islands by American citizens, and that their endeavors and money resulted in changing the islands into enlightened communities and laid the foundation for trade and commerce; that if this had been done by the agents of a colonizing power it would have undoubtedly led to a paramount claim for protection and control or annexation, as the policy might dictate; that the United States had slept upon its rights to reap the benefit of these developments by its citizens but that nevertheless it could not forego its inalienable privilege to protect its citizens in the vested rights they had built up by 50 years of sacrifice and endeavor. Lord Rosebery on receiving these representations gave—

“an assurance that the rights and interests of United States citizens established in the Gilbert Islands will be fully recognized and respected by the British authorities.” (Moore’s International Law Digest, Vol. I, pp. 425, 426.)

The Swan Island Commercial Co. upon the facts set forth above unquestionably possesses certain imperfect or inchoate rights. These rights depended for their perfection upon the filing of the bond under the Guano Islands Act; but as has been shown, such rights would have been limited merely to the protection of the United States during the operation of the said islands. The property rights of said company, irrespective of the Guano Islands act, are dependent upon the assumption of sovereignty over the islands by the United States Government. Upon such assumption, there can be no doubt that the rights of the company in the lands occupied and improved by it will become at least so equitably fixed as to warrant some provision for compensation by the Government.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE SECRETARY OF THE NAVY.

NAVAL SERVICE—DESSERTION—PARDON.

An officer of the Navy who has been dismissed by sentence of court-martial, and subsequently pardoned for the offense for which dismissed, is ineligible for reappointment to the Navy or to membership in the Fleet Naval Reserve.

An enlisted man who in time of peace has incurred the penalties for desertion prescribed by Revised Statutes, sections 1996 and 1998, as amended, and who has received an unconditional pardon for such offense, is eligible for reentry into the naval service.

A person "who has deserted in time of war from the naval or military service of the United States," and who has been pardoned for the offense, is ineligible for reenlistment in the naval service, in view of the provisions of sections 1420 and 1624 of the Revised Statutes, as amended by the act of August 22, 1912 (37 Stat. 356).

DEPARTMENT OF JUSTICE,

February 15, 1918.

SIR: I have the honor to reply to your letter of November 24, 1917, in which you request my opinion on three questions which have arisen in the administration of your Department touching the eligibility for reentry into the naval service, after pardon by the President, of former officers and enlisted men who have incurred statutory disabilities resulting from dismissal under sentence of court-martial or from desertion. The questions are as follows:

"(a) Is an officer of the Navy who has been dismissed by sentence of court-martial and subsequently pardoned for the offense for which dismissed eligible for reappointment to the Navy or to membership in the Fleet Naval Reserve, in view of section 1441 of the Revised Statutes, section 21 of the act of February 16, 1914 (38 Stat. 283, 290), and the provisions of the act of August 29, 1916 (39 Stat. 589)?"

"(b) Is an enlisted man who has incurred the penalties prescribed by Revised Statutes, section 1996, and Revised Statutes, section 1998, as amended August 22, 1912 (37 Stat. 356), and who has been pardoned, eligible to hold an office of trust or profit in the Navy, or to serve as an enlisted man in the Navy?"

"(c) Is a person who has deserted in time of war from the naval or military service of the United States eligible, after pardon, for reenlistment in the naval service, in view of the provisions of sections 1420 and 1624 of the Revised

Statutes, as amended by the act of August 22, 1912 (37 Stat. 356)?"

I.

IS AN OFFICER OF THE NAVY WHO HAS BEEN DISMISSED BY SENTENCE OF COURT-MARTIAL, AND SUBSEQUENTLY PARDONED FOR THE OFFENSE FOR WHICH DISMISSED, ELIGIBLE FOR REAPPOINTMENT TO THE NAVY OR TO MEMBERSHIP IN THE FLEET NAVAL RESERVE?

The statutes involved in the consideration of this question are as follows:

"*Revised Statutes, section 1441.*—No officer of the Navy who has been dismissed by the sentence of a court-martial, or suffered to resign in order to escape such dismissal, shall ever again become an officer of the Navy.

"*Act of February 16, 1914, section 21 (38 Stat. 283, 290).*—That the President may also commission or warrant as of the highest rank formerly held by him, or the present equivalent of such former rank in case the nomenclature or some of the specific duties of the same may have been changed, any person who having been formerly a commissioned or warrant officer of the United States Navy shall have been honorably discharged from the service.

"*Act of August 29, 1916 (39 Stat. 556, 589).*—All former officers of the United States naval service, including midshipmen, who have left that service under honorable conditions, and those citizens of the United States who have been, or may be entitled to be, honorably discharged from the naval service after not less than one four-year term of enlistment or after a term of enlistment during minority, and who shall have enrolled in the Naval Reserve Force shall be eligible for membership in the Fleet Naval Reserve."

In substance, your inquiry is whether an unconditional pardon removes the disability imposed by Revised Statutes, section 1441.

The answer depends, I think, upon whether section 1441 is properly to be regarded as imposing punishment for an offense or as merely prescribing a qualification for appointees to office in the Navy.

By express provision of the Constitution, Article II, section 2, the President has plenary power, except in cases of impeachment, to pardon all Federal offenses; and a pardon, of course, relieves the offender of all disabilities imposed by way of punishment. *Ex parte Garland*, 4 Wall. 333, 380.

On the other hand, under its powers "to raise and support armies," "to provide and maintain a navy," and "to make rules for the government and regulation of the land and naval forces" (Constitution, Art. I, sec. 8), Congress may prescribe the qualifications of officers of the Army and Navy. (13 Op. 516, 524; 14 Op. 164, 172; 18 Op. 18, 23; 26 Op. 502, 503.)

If in the exercise of these powers Congress thinks proper to accept the fact of dismissal or enforced resignation of a naval officer as evidence of unfitness, of lack of qualification, in my opinion it may do so without having its action in that regard overridden by the pardoning power of the President. An unconditional pardon abates whatever punishment flows from the commission of the pardoned offense, but can not in the nature of things eradicate the *factum* which is made a criterion of fitness. (See 27 Op. 178, 183; 22 Op. 36; article by Prof. Williston, *Harv. L. Rev.*, vol. 28, p. 647.)

What, then, is the nature of the disability imposed by Revised Statutes, section 1441? Is it a punishment or does the section merely prescribe qualifications for office in the Navy?

Section 1441 is derived from section 11 of an act approved July 16, 1862 (12 Stat. 583), entitled "An act to establish and equalize the grade of line officers of the United States Navy." That act provided generally for a division of line officers of the Navy into certain specified grades, fixed the number of officers to be allowed in each grade, divided the vessels of the Navy into certain classes and provided how they were to be commanded, established examining boards to determine the qualifications of officers for promotion, provided how promotions were to be made to the grade of rear admiral, contained pro-

visions relative to the retirement of officers, the advancement of officers and enlisted men for distinguished conduct in battle, established the relative rank between officers of the Army and Navy, provided for promotions on the retired list, fixed the pay of officers on the active and retired lists, authorized the detail of an officer as an assistant to the Bureau of Medicine and Surgery, fixed the relative rank between officers of the active and retired lists in the Navy, and contained other miscellaneous provisions relating to organization, allowances, etc., of the Navy. Section 11 of the act related principally to the appointment and qualification of students at the Naval Academy; it contained the following proviso, the latter half of which was afterwards incorporated in the Revised Statutes without substantial change as section 1441:

“Midshipmen deficient at any examination shall not be continued at the academy, or in the service, unless upon recommendation of the academic board; nor shall any officer of the Navy who has been dismissed by sentence of a court-martial, or suffered to resign to escape one, ever again become an officer of the Navy.”

As pointed out by the Judge Advocate General of the Navy in his memorandum of November 24, 1917, accompanying your letter, the whole content of the original section and of the act of which it formed a part discloses its nonpenal character. The act related to the Navy generally and did not provide for the punishment of individual offenders. On the other hand, an act of clearly penal character was approved by the President on the following day, July 17, 1862 (12 Stat. 600), entitled “An act for the better government of the Navy of the United States,” which established certain “articles for the government of the Navy,” made general provisions for the punishment of all offenses of whatever character by persons belonging to the Navy, whether at sea or on shore, including provisions for the constitution and procedure of courts-martial, the punishments which they might impose, and specifying also the minor punishments authorized to be inflicted by commanding officers without

trial. Had Congress considered the provision now embodied in Revised Statutes, section 1441, as a part of the penal laws relating to the Navy and not as a measure affecting the qualifications of officers, it would logically have included it in the statute of July 17, 1862, rather than in the act of the day before relating to the organization of the Navy.

I conclude, therefore, that section 1441 should be viewed as a part of the law prescribing the qualifications of officers in the Navy generally, and not as a part of the law for the punishment of individual offenders.

Of course, where a statute although purporting to prescribe qualifications for office has no real relation to that end but is obviously intended to inflict punishment for a past act or to add to the punishment of an offender who has been pardoned, the disguise may be penetrated. *Cummings v. Missouri*, 4 Wall. 277, 319; *Ex parte Garland*, 4 Wall. 333, 380. But there is nothing of that sort here.

A distinction has been drawn, also, between deprivation of a common right, between "exclusion from any of the professions or any of the ordinary avocations of life," and exclusion from holding public office. In *Ex parte Garland*, the Supreme Court, while stating that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment" (p. 377), was careful to add (p. 378):

"The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution."

The broad language in some of the cases to the effect that a pardon "obliterates in legal contemplation the offense itself" (16 Wall. 151), was not essential to the decisions actually rendered. (See *Ex parte Garland*, 4 Wall. 333, 380; *Carlisle v. United States*, 16 Wall. 147, 153; *Osborn v. United States*, 91 U. S. 474, 477; *Knote v. United States*, 95 U. S. 149, 153.) It must, moreover, be regarded as limited by the opinion in the recent case of *Carlesi v.*

New York, 233 U. S. 51. There it was held that the taking into consideration by a State court of the fact that a person convicted had previously committed a similar crime against the United States does not deprive the convicted person of any Federal rights under a pardon by the President of the first offense. While the decision is confined to the effect of the pardon upon the power of the States, the court observes:

“ * * * we must not be understood as in the slightest degree intimating that a pardon would operate to limit the power of the United States * * * to provide for taking into consideration past offenses committed by the accused as a circumstance of aggravation even although for such past offenses there had been a pardon granted.

“ Indeed, we must not be understood as intimating that it would be beyond the legislative competency to provide that the fact of the commission of an offense after a pardon of a prior offense, should be considered as adding an increased element of aggravation to that which would otherwise result alone from the commission of the prior offense ” (p. 59).

For the reasons stated, I am of opinion that section 1441 of the Revised Statutes is properly to be regarded as a rule relating to qualification for office in the Navy, that it does not impose a penalty as such on individual offenders, and that the incidental disabilities which they may suffer by reason of the statute are not removed by a pardon.

Nor do the acts of February 16, 1914 (38 Stat. 283, 290), and of August 29, 1916 (39 Stat. 589), show any purpose on the part of Congress to change the requirement of section 1441; on the contrary they confirm it, since each of these later acts by its terms applies only to officers who have been “honorably discharged from the service,” or who have “left that service under honorable conditions.”

I therefore answer your first question in the negative.

II.

IS AN ENLISTED MAN WHO HAS INCURRED THE PENALTIES PRESCRIBED BY REVISED STATUTES, SECTION 1996, AND REVISED STATUTES, SECTION 1998, AS AMENDED AUGUST 12, 1912 (37

STAT. 356), AND WHO HAS BEEN PARDONED ELIGIBLE TO HOLD AN OFFICE OF TRUST OR PROFIT IN THE NAVY, OR TO SERVE AS AN ENLISTED MAN IN THE NAVY?

The statutes referred to in this question are as follows:

Section 1998, R. S.—"Every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six."

Section 1996, R. S.—"All persons who deserted the military or naval service of the United States and did not return thereto or report themselves to a provost marshal within sixty days after the issuance of the proclamation by the President, dated the 11th day of March, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof."

Act of 22 August, 1912 (37 Stat. 356).—"That section nineteen hundred and ninety-eight of the Revised Statutes of the United States be, and the same is hereby, amended to read as follows: 'Sec. 1998. That every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six of the Revised Statutes of the United States: *Provided*, That the provisions of this section and of section nineteen hundred and ninety-six shall not apply to any person hereafter deserting the military or naval service of the United States in time of peace: *And provided further*, That the loss of rights of citizenship heretofore imposed by law upon deserters from the

military or naval service may be mitigated by the President where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interests.’”

The essential words of the foregoing statutes, so far as concerns the disabilities which they impose, are that deserters—

“shall be liable to all the penalties and forfeitures of section 1996;”

which are as follows:

“Such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising *any rights of citizens thereof*.”

Here, as contradistinguished from the situation presented under section 1441, *supra*, the disabilities are not merely incidental to rules prescribing the qualifications for service in the Navy, but in effect and by express avowal are penalties for the punishment of offenses. As such, of course, they would be wiped out by an unconditional pardon.

The fact that by the act of August 22, 1912, Congress expressly recognized the right of the President to remit such penalties “where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interest” can not affect the power of the President, which exists independently of legislative recognition, to remit such penalties by pardon, whether the offense were committed in time of peace or in time of war.

I therefore answer your second question by stating as my opinion that in so far as ineligibility to reenter the naval service depends upon the provisions of Revised Statutes, sections 1996 and 1998, as amended, the disability is effectually removed by an unconditional pardon.

III.

IS A PERSON “WHO HAS DESERTED IN TIME OF WAR FROM THE NAVAL OR MILITARY SERVICE OF THE UNITED STATES” ELIGIBLE, AFTER PARDON, FOR REENLISTMENT IN THE NAVAL SERVICE, IN VIEW OF THE PROVISIONS OF SECTIONS 1420 AND 1624

OF THE REVISED STATUTES, AS AMENDED BY THE ACT OF
AUGUST 22, 1912 (37 STAT. 356)?

The statutes involved in the consideration of this question are as follows:

Section 1420, R. S., as amended by act of 22 August, 1912 (37 Stat. 356).—"No minor under the age of fourteen years, no insane or intoxicated person, and no person who has deserted in time of war from the naval or military service of the United States, shall be enlisted in the naval service."

Section 1624, R. S., Article 19, as amended by act of 22 August, 1912 (37 Stat. 356).—"Any officer who knowingly enlists into the naval service any person who has deserted in time of war from the naval or military service of the United States, or any insane or intoxicated person, or any minor between the ages of fourteen and eighteen years, without the consent of his parents or guardian, or any minor under the age of fourteen years, shall be punished as a court-martial may direct."

For present purposes these two provisions come to the same thing, i. e., both are directed to the end of preventing the enlistment in the naval service of any person who has deserted from the naval or military service in time of war.

The question here is whether a pardon removes this disqualification.

These statutes relate to the general organization and efficiency of the Navy. They affect only incidentally particular classes of individuals and are obviously not intended as punishment for offenses. They place deserters in the same category with minors, insane persons, and intoxicated persons as not qualified for the naval service.

In an opinion by Attorney General Bonaparte dated June 16, 1908 (26 Op. 617), it was held that a full and unconditional pardon of a deserter from the Navy so far removes all the disabilities incident to his offense that it is in legal contemplation obliterated, so that he can no longer be regarded as a deserter or denied reenlistment under Revised Statutes, section 1420. For the reasons heretofore stated in answer to your first question, *supra*, I am unable to concur in this view.

In an earlier opinion (22 Op. 36) Attorney General Griggs, construing a statutory requirement that "no soldier shall be again enlisted in the Army whose service during his last preceding term of enlistment has not been honest and faithful" (28 Stat. 216), held that a candidate for enlistment whose previous service had not been honest and faithful could be rejected notwithstanding the President's pardon of the offense.

The reasoning there was that—

"whilst the President's pardon restores the criminal to his legal rights and fully relieves him of the disabilities legally attaching to his conviction, it does not destroy an existing fact, viz, that his service was not honest and faithful" (p. 39).

Neither does a pardon destroy the fact of desertion. This reasoning finds support in the opinion of the Supreme Court in *Carlesi v. New York*, *supra*.

These two opinions of my predecessors are apparently irreconcilable in principle. A later opinion by Attorney General Bonaparte (27 Op. 178, 182-183), holding that a pardon could not convert a dismissal under sentence of court-martial into an honorable discharge, which was a prerequisite to the grant of a pension, seems to return to the reasoning of the earlier opinion of Attorney General Griggs.

For the reasons stated I am of opinion that a pardon does not remove the disqualification attached to the *fact* of desertion by Revised Statutes, sections 1420 and 1624, and therefore answer your third question in the negative.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE SECRETARY OF THE NAVY.

REDEMPTION OF WAR-SAVINGS CERTIFICATES AND STAMPS.

The Attorney General declines compliance with the request of the Postmaster General for an opinion as to the validity of articles 9 and 10 of the Treasury Regulations, relating to the redemption of War Savings certificates and stamps of deceased owners, be-

cause the question is not one arising in the administration of the Post Office Department.

The payment or redemption of these certificates and stamps by postmasters or employees of the Post Office Department, if arranged by comity, must be in accordance with the regulations prescribed by the Secretary of the Treasury.

DEPARTMENT OF JUSTICE,

March 2, 1918.

SIR: I have the honor to acknowledge receipt of your letter of the 23d ultimo, with inclosures, requesting my opinion upon the validity of articles 9 and 10 of the Treasury Regulations, relating to the redemption of War-Savings certificates and stamps of deceased owners. In this connection you call my attention to section 9 of the act of September 24, 1917 (40 Stat. 292), which reads as follows:

"That in connection with the *operations of advertising, selling, and delivering* any bonds, certificates of indebtedness, or War-Savings certificates of the United States provided for in this Act, the Postmaster General, under such regulations as he may prescribe, shall require, at the request of the Secretary of the Treasury, the employees of the Post Office Department and of the Postal Service to perform such services as may be necessary, desirable, or practicable, without extra compensation."

It seems plain that by the terms of this section your duty is confined to cooperating with the Treasury Department in the "operations of advertising, selling, and delivering * * * War-Savings certificates." The payment or redemption of these certificates thus appears to be a responsibility with which you are not associated by law, although perhaps your Department may, as an act of comity to the Treasury Department, authorize postmasters and other employees to pay or redeem such stamps. Of course, your authority to use the postal funds for this purpose would have to rest upon some independent statute, or postal regulation having the authority of law, touching the use of such funds. The conditions of payment or redemption of War-Savings certificates, it appears by section 6 of the above Act of 1917, Congress has committed solely to the determination of the Secretary of the Treasury.

Manifestly the making of regulations touching registration, nomination of beneficiaries, etc., falls to his lot. The only regulations with which the Postmaster General can, in this connection, be officially concerned are such as may be prescribed by him for adapting or molding the employees of the Post Office establishment to the task of aiding in advertising, selling, and delivering of the stamps.

It, therefore, follows that the payment or redemption of these stamps by postmasters or employees of your Department, if arranged by comity, must be in accordance with the regulations prescribed by the Secretary of the Treasury, or not at all. In this situation the question now submitted by you can not be said to arise in the administration of your Department, and I am compelled, therefore, to decline compliance with your request for my opinion thereon.

Respectfully,

T. W. GREGORY.

To the POSTMASTER GENERAL.

IMPORTATION OF WINES, VERMUTH, AND GINGER
CORDIAL.

Wines, including vermuth and ginger cordial, though fortified with distilled spirits, are not, within the meaning of the Food-Control Act of August 10, 1917, and the War Revenue Act of October 3, 1917, *distilled spirits* if they do not contain more than 24 per cent absolute alcohol by volume, and their importation is therefore not prohibited.

DEPARTMENT OF JUSTICE,

March 9, 1918.

SIR: I have the honor to acknowledge receipt of your letter of February 23, 1918, requesting an opinion on the question—

“whether wines, including ginger cordial and vermuth, when containing distilled spirits added for fortification or preservation, but containing not more than 24 per cent absolute alcohol by volume, are prohibited importations under section 15 of the act of August 10, 1917, and section 801 of the act of October 3, 1917.”

Section 15 of the act of August 10, 1917 (40 Stat. 282), known as the Food-Control Act, first forbids the use of foods, fruits, food materials, or feeds in the production of *distilled spirits* except, under regulations to be prescribed by the President, for nonbeverage purposes, "or for the fortification of pure sweet wines as defined by the Act entitled 'An Act to increase the revenue, and for other purposes,' approved September eighth, nineteen hundred and sixteen."

It then concludes:

"Nor shall there be imported into the United States any distilled spirits."

Section 301 of the act of October 3, 1917 (40 Stat. 308), known as the War Revenue Act, prohibits absolutely with certain exceptions not now necessary to be mentioned, the importation of *distilled spirits* produced after its passage for (1) beverage purposes and (2) for use in the manufacture or production of any article used or intended for use as a beverage.

The prohibition of the two acts, therefore, is confined to *distilled spirits* and does not apply to fermented liquors, such as wines.

But the Food-Control Act refers to the revenue act of 1916 for a definition of the fortification of wine, and the act of October 3, 1917, is itself a revenue act, and both of these revenue acts impose one tax on *distilled spirits* and another on *wines*. Clearly, then, the term "distilled spirits" is used in the prohibition in the same sense that it is used in imposing the taxes.

In that sense it ordinarily includes any product which contains distilled spirits. It was so held in *Jordan v. Roche*, 228 U. S. 444, overruling *Newhall v. Jordan*, 149 Fed. 586, and *Anderson v. Newhall*, 161 Fed. 906, the court saying:

"By section 3254 it is provided that 'all products of distillation, by whatever name known, which contain distilled spirits or alcohol, on which the tax imposed by law has not been paid, shall be considered and taxed as distilled spirits.' In other words, all mixtures or dilutions

of the substance so defined, and more specifically in section 3248, are subject to a tax as 'distilled spirits.'"

Nothing else appearing, I would say that wine fortified with distilled spirits would be included in the prohibition. But section 401 of the act of September 8, 1916 (39 Stat. 783), defines natural wine as the product made from the normal alcoholic fermentation of grape juice, but provides that the product resulting from the addition of certain quantities of sugar and water shall be deemed *wine* within the meaning of the act when, among other things, it does not contain more than 13 per cent of alcohol, with the further proviso:

"That wine as defined in this section may be sweetened with cane sugar or beet sugar or pure condensed grape must *and fortified under the provisions of this Act*, and wines so sweetened or fortified shall be considered sweet wine within the meaning of this Act."

Section 402 of the same act provides for the fortification of wines by the addition of wine spirits, which may be withdrawn from the distillery without the payment of tax, or tax-paid grain or other ethyl alcohol. The same section imposes upon "all still wines, including vermouth, and upon all artificial or imitation wines or compound sold as wine," a tax varying with the amount of alcohol contained under 24 per cent, and then provides:

"All such wines containing more than twenty-four per centum of absolute alcohol by volume shall be classed as distilled spirits and shall pay tax accordingly."

The act of October 3, 1917, imposes an additional tax on such wines in the same manner. I am therefore of opinion that, in the acts containing the prohibition in question, Congress has expressed the intention that wines, including vermouth, though fortified with distilled spirits, shall not be classed as distilled spirits unless they contain more than 24 per cent of alcohol.

Section 402 of the act of September 8, 1916 (39 Stat. 783), classes cordials (which I presume includes ginger cordial) with sparkling wines and imposes a tax of so much a bottle, manifestly in lieu of the tax on distilled spirits. And the act of October 3, 1917, imposes a like additional tax,

I conclude that wines, including vermouth and ginger cordial, though fortified with distilled spirits, are not, within the meaning of the acts in question, *distilled spirits* if they do not contain more than 24 per cent absolute alcohol by volume, and that their importation is therefore not prohibited.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE TREASURY.

TAX ON FREIGHT ON ARTICLES IN COURSE OF EXPORTATION.

Section 500 of the War Revenue Act of October 3, 1917 (40 Stat. 314), should be construed as not intended to cover freight on articles in course of exportation.

The question whether articles are in course of exportation does not depend upon the bill of lading or like formal matters, but upon the real substance and intent of the shipment.

DEPARTMENT OF JUSTICE,

March 12, 1918.

SIR: I have the honor to acknowledge your letter of the 27th ultimo requesting my opinion on the proper construction of certain portions of section 500 of the War Revenue Act of October 3, 1917, 40 Stat. 300, 314.

That section, in so far as material to your inquiry, provides:

"There shall be levied, assessed, collected, and paid (a) a tax equivalent to three per centum of the amount paid for the transportation by rail or water * * * of property by freight consigned from one point in the United States to another; * * *"

Section 501 of the act provides:

"That the taxes imposed by section 500 shall be paid by the person, corporation, partnership, or association paying for the services or facilities rendered."

For the purpose of promulgating proper regulations for the assessment and collection of the taxes imposed by section 500, you make the following specific inquiries:

"1. In view of the provision of Article I, section 9 of the Constitution that 'no tax or duty shall be laid on ar-

ticles exported from any State,' may the tax imposed by section 500 of the act be held to apply to the transportation of 'property by freight consigned from one point in the United States to another' when that property is moving in the course of exportation?

"2. If the tax imposed by section 500 can not in view of the constitutional prohibition be held to apply to the transportation of property by freight consigned when such property is moving in the course of exportation, what is the test as to whether or not such property is in the course of exportation? Is the test solely whether the property is moving upon a through bill of lading or other shipping document covering the exportation, or is it sufficient to establish its export character that the property is being moved for export, even though it is shipped upon a local bill of lading?"

1. The tax levied by section 500, *supra*, is directly upon the freight, that is, upon the price paid for the carriage of the goods, and the burden of it falls on the consignor or consignee. It is therefore without question a tax or duty on the transportation itself, and, looked at merely from the point of view of its incidence as a tax, it does not apparently differ, in its legal aspect, from a tax on the bill of lading, on the warehouse receipt, on the charter party, on the manifest, or on the policy of marine insurance, all of which have been held to be a tax on articles exported within the meaning of the Constitution (*Fairbank v. U. S.* 181 U. S. 283; *N. Y. & Cuba Mail S. S. Co. v. U. S.* 125 Fed. 320, 200 U. S. 488, 491; *Selliger v. Kentucky*, 213 U. S. 200, 207; *U. S. v. Hvoslef*, 237 U. S. 1; *Thames and Mersey Marine Ins. Co. v. U. S.* 237 U. S. 19). Indeed, insofar as the mere incidence of the tax is concerned, the matter seems to be settled by *U. S. v. Hvoslef*, *supra*, for the charter parties in that case were described by the Supreme Court as "in contemplation of law a mere contract of affreightment" (p. 16). In *Thames and Mersey Ins. Co. v. U. S.* *supra*, it is clearly implied on page 27 of the opinion that a tax or duty on freight would be a tax on the articles themselves.

In the cases cited above, the tax was directly upon transactions connected with the very act of exportation, while in the present case the tax is laid only on the transportation within the United States. It can not be regarded as a tax laid upon the shipments as exports or by reason or because of their exportation (*Coe v. Errol*, 116 U. S. 517, 525, 526). It is nevertheless, as stated above, a tax upon the act of transportation and not upon the goods as a part of the general mass of property within the United States, irrespective of their movement. In the case of *U. S. v. Hvoslef*, *supra*, the court said, p. 13:

"The prohibition relates only to exportation to foreign countries (*Woodruff v. Parham*, 8 Wall. 123; *Dooley v. United States*, 183 U. S. 151, 154, 162), and is designed to give immunity from taxation to property that is in the actual course of such exportation (*Pace v. Burgess*, 92 U. S. 372; *Turpin v. Burgess*, 117 U. S. 504; *Cornell v. Coyne*, 192 U. S. 418). This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction, but in effect overriding it. It was the clear intent of the framers of the Constitution that 'the process of exporting the products of a State, the goods, chattels, and property of the people of the several States should not be obstructed or hindered by any burden of taxation.' Miller on the Constitution, p. 592."

The distinction between articles in the course of transportation to foreign countries and articles merely being manufactured, or warehoused, for exportation is justified by the decisions quoted by the Supreme Court of *Pace v. Burgess*, *Turpin v. Burgess*, and *Cornell v. Coyne*, as well as by the cases cited, *infra*, on the necessity of a through bill of lading. It is evident that a tax upon the freight on articles destined for export might cause a serious discrimination between inland States and those situated

near the seaboard, and thus produce the very evil the Constitution intended to prevent.

However, it is not necessary for present purposes to go further than to say that the power to levy a tax on the freight on articles moving in the course of transportation to foreign countries is so doubtful as to lead to the conclusion that Congress did not intend by section 500 to exercise it, but merely meant to cover property "consigned from one point in the United States to another," *not in the course of exportation*. (See *U. S. v. Jin Fuey Moy*, 241 U. S. 394, 401).

2. It is now entirely settled that the question whether goods are in the course of transportation in interstate or foreign commerce does not depend upon the bill of lading or formal matters of that sort, but upon the real substance and intent of the shipment. (*Texas & N. O. R. R. Co. v. Sabine Tram Co.* 227 U. S. 111, and cases cited; *Louisiana R. R. Comm. v. Tex. & Pac. Ry.* 229 U. S. 336; *So. Covington Ry. v. Covington*, 235 U. S. 537, 545; *Ill. Cent. R. R. v. Louisiana Railroad Commission*, 236 U. S. 157, 163; *Atchison & Topeka Ry. v. Harold*, 241 U. S. 371, 375, 376.) The case is different where the shipment is, in fact, "broken." (*Gulf, Colorado & S. F. Ry. Co. v. Texas*, 204 U. S. 403.)

My conclusion is that section 500 should be construed as not covering freight on articles in course of exportation, and that articles may be in course of exportation without a through bill of lading. I venture to suggest, however, that your regulations require strict proof of the fact that the shipment in question is really destined for export.

Respectfully, yours,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

ACQUISITION OF LAND AT SQUANTUM POINT FOR CONSTRUCTION OF TORPEDO-BOAT DESTROYERS.

Upon the taking over by the President of certain land at Squantum Point, Mass., for the construction of torpedo-boat destroyers, as provided for by the act of October 3, 1917 (40 Stat. 371), a valid title to the land so taken vested in the United States, and the

expenditures authorized by said act for the acquisition of such land are not subject to the provisions of section 355 of the Revised Statutes.

DEPARTMENT OF JUSTICE,

March 15, 1918.

SIR: I have the honor to reply to your letter of March 5, 1918, in which you call my attention to the acquisition of real estate at Squantum Point, Quincy, Mass., of which possession has been taken and on which the President has directed that a suitable plant be erected for the expeditious construction of torpedo-boat destroyers. You state that this action has been taken under the authority granted to the President by the urgent deficiency act approved October 6, 1917 (40 Stat. 371), the applicable portion of which reads:

"For acquiring and providing facilities for the expeditious construction of additional torpedo-boat destroyers, and for each and every purpose connected therewith, and toward their construction, to cost in all not more than \$350,000,000, \$225,000,000, or so much thereof as may be necessary, to be expended at the direction and in the discretion of the President.

"The President is hereby authorized and empowered, within the amount hereinbefore authorized, to acquire or provide facilities additional to those now in existence for the construction of torpedo-boat destroyers, their hulls, machinery, and appurtenances, including the immediate taking over for the United States of the possession of and title to land, its appurtenances and improvements, which he may find necessary in this connection.

"That if said lands and appurtenances and improvements shall be taken over as aforesaid, the United States shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid 75 per cent of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said 75 per cent will make up such amount as will be just compensation therefor, in the manner pro-

vided for by section 24, paragraph 20, section 145 of the Judicial Code.

"Upon the taking over of said property by the President as aforesaid the title to all property so taken over shall immediately vest in the United States."

You request me to advise you whether, before expenditure of this appropriation is made for acquisition of land and the construction of the proposed buildings, it is essential that the consent of the Legislature of Massachusetts shall be first given and my written opinion had in favor of the title, calling attention to section 355 of the Revised Statutes of the United States. This section reads, in part:

"No public money shall be expended upon any site or land purchased by the United States for the purpose of erecting thereon any armory, arsenal, fort, fortification, navy yard, customhouse, lighthouse, or other public building, of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given."

The act of October 6, 1917, provides in terms that "upon the taking over of * * * property by the President the title to all property so taken over shall immediately vest in the United States." Having regard to this positive expression of the legislative will and to the ample provision for the prompt ascertainment and payment of just compensation to the owners of the expropriated lands, my opinion, if needed or requested, might well be given that upon the taking over of the real estate by the President, in accordance with the act, a valid title thereto has vested in the United States, and that the former owners are relegated to the ample remedies provided for the payment or recovery of the damages justly due them. There would thus remain for solution only the requirement contained in section 355 relating to cession of jurisdiction by the State. (*Crozier v. Krupp*, 224 U. S. 290; *Great Falls Co. v. Garland*, 25 Fed. 521; *U. S. v. O'Neill*, 198 Fed. 677; *Cherokee Nation v. Kans. Ry.* 135 U. S. 641; *Cf. People v. Adirondack Ry.* 160 N. Y. 225, affirmed in 176 U. S. 335; *Sweet v. Rechel*,

159 U. S. 380; *Backus v. Fort Street Co.* 169 U. S. 557; *Williams v. Parker*, 188 U. S. 491.)

I am, however, of opinion that the language of the statute, appropriating money "to be expended at the direction and in the discretion of the President" has the effect of relieving the Executive, if in his discretion he so determines and directs, from the limitations ordinarily incident to the expenditure of public money upon sites for public buildings contained in section 355. Having regard to the wide discretion confided to him and to the extraordinary emergency which, without doubt, was in the mind of the Congress when the appropriation was made, it is unreasonable to assume that it was intended that the prosecution of this essential work should await the possible tardy action of State legislatures or that it should be altogether prevented by the not inconceivable contingency of the refusal of some one of them to give the needful consent contemplated by section 355. I, therefore, answer the question propounded in the negative. (9 Comp. Dec. 457; 9 Comp. Dec. 805; *Pacific Steam Whaling Co. v. U. S.* 36 Ct. Cl. 105; 22 Op. 442; *Cf.* 20 Op. 484; 20 Op. 556; 22 Op. 301; 27 Op. 459.)

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE NAVY.

FEDERAL RESERVE BANKS—CHARGES FOR THE COLLECTION AND PAYMENT OF CHECKS.

The limitations contained in section 13 of the Federal Reserve Act, as amended, relating to charges for the collection and payment of checks, do not apply to State banks not connected with the Federal reserve system as members or depositors. Checks on banks making such charges can not, however, be cleared or collected through Federal reserve banks.

DEPARTMENT OF JUSTICE,

March 21, 1918.

SIR: You have requested my opinion as to whether the limitations contained in section 13 of the Federal Reserve Act relating to charges for the collection and payment of checks can be held to apply to State banks which are

neither members of the Federal reserve system nor depositors in Federal reserve banks.

As originally enacted, the first paragraph of section 13 (38 Stat. 263) read as follows:

"Any Federal reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks and drafts upon solvent member banks, payable upon presentation; or, solely for exchange purposes, may receive from other Federal reserve banks deposits of current funds in lawful money, national-bank notes, or checks and drafts upon solvent member or other Federal reserve banks, payable upon presentation."

In section 16, apparently as the basis of a system of check clearing or collection, it is provided that Federal reserve banks *shall receive on deposit at par* checks and drafts on member and other Federal reserve banks; and the Federal Reserve Board is authorized to fix by rule the *charges to be collected by member banks from patrons whose checks are cleared through the Federal reserve bank* and any charge for the service of clearing or collection rendered by the Federal reserve bank.

It will be noted that under the first paragraph of section 13 in its original form the only classes of banks which might be depositors in and thus clear through a Federal reserve bank were its member banks and other Federal reserve banks, and the only checks and drafts specified as receivable on deposit were checks and drafts drawn upon member banks or upon other Federal reserve banks.

The acts of September 7, 1916 (39 Stat. 752), and June 21, 1917 (40 Stat. 235), so amended the first paragraph of section 13 as to extend the clearing and collection facilities of the Federal reserve system to include checks and drafts generally, to make these facilities directly available to nonmember banks, and to establish the limitations as to charges referred to in the question submitted. The paragraph as so amended reads as follows:

"Any Federal reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Fed-

eral reserve notes, or checks, and drafts, payable upon presentation, and also, for collection, maturing notes and bills; or, solely for purposes of exchange or of collection, may receive from other Federal reserve banks deposits of current funds in lawful money, national-bank notes, or checks upon other Federal reserve banks, and checks and drafts, payable upon presentation within its district, and maturing notes and bills payable within its district; or, solely for the purposes of exchange or of collection, may receive from any nonmember bank or trust company deposits of current funds in lawful money, national-bank notes, Federal reserve notes, checks and drafts payable upon presentation, or maturing notes and bills: *Provided*, Such nonmember bank or trust company maintains with the Federal reserve bank of its district a balance sufficient to offset the items in transit held for its account by the Federal reserve bank: *Provided further*, That *nothing in this or any other section of this Act shall be construed as prohibiting a member or nonmember bank from making reasonable charges, to be determined and regulated by the Federal Reserve Board, but in no case to exceed 10 cents per \$100 or fraction thereof, based on the total of checks and drafts presented at any one time, for collection or payment of checks and drafts and remission therefor by exchange or otherwise; but no such charges shall be made against the Federal reserve banks.*" [Italics mine.]

The limitations as to charges referred to in the question submitted are contained in the second proviso quoted above. This proviso, apparently recognizing an existing right of member and nonmember banks to make reasonable charges for the collection or payment of checks and drafts and remission therefor by exchange or otherwise, provides (1) that these charges are "to be determined and regulated by the Federal Reserve Board, but in no case to exceed 10 cents per \$100," but (2) that "no such charges shall be made against the Federal reserve banks."

Clearly these limitations apply to national banks, which are compelled to be member banks, to such State banks as become member banks by voluntarily accepting the terms and provisions of the Federal reserve act, and to such other

State banks as do not become member banks but by becoming depositors in Federal reserve banks upon the conditions specified avail themselves directly of the facilities of the Federal reserve clearing system.

The specific question to be determined is whether these limitations apply to nonmember State banks which do not become depositors but checks upon which may pass through Federal reserve banks in process of clearing or collection.

The theory and scheme of the Federal reserve legislation seems inconsistent with the purpose on the part of Congress to subject State banks *against their will* to Federal control or regulation. State banks are not compelled to become members of the Federal reserve system or depositors therein. Those possessing the necessary qualifications are, however, invited to become members. They are not only free to accept or decline, but if they accept remain at liberty to withdraw from the system. (Sec. 9.) By section 13, as amended, State banks not desiring to become members or too small to be eligible for membership are likewise *invited* to share in the clearing and collection facilities of the system by becoming depositors in Federal reserve banks. But they may accept or reject the invitation, and if they become depositors may close their accounts at their pleasure.

It would accordingly seem that the limitations referred to ought not to be regarded as intended to be imposed upon State banks not connected with the Federal reserve system as members or depositors *against the will* of such banks, unless that intention clearly appears.

The term "nonmember bank," as used in the proviso, may reasonably be construed as referring to a nonmember bank that has become a depositor as authorized in the preceding provisions of the paragraph. If this term is so construed, obviously the provision requiring charges "to be determined and regulated by the Federal Reserve Board, but in no case to exceed 10 cents per \$100," will have no application to nonmember State banks which are not depositors in a Federal reserve bank. The broad language of the concluding clause, "no such charges shall be

made against the Federal reserve banks," may be construed not as directed against State banks which are not depositors but merely as specifying a condition upon which checks may clear through the Federal reserve banks—in effect a prohibition against the payment of such charges by the Federal reserve banks.

Under this construction, member banks and nonmember banks which are depositors in the Federal reserve banks will be subject to the limitations in the proviso, but nonmember banks which are not depositors will not be subject to the limitations. All, however, will have to adjust their charges among themselves and with their own depositors, the Federal reserve banks being prohibited from paying such charges.

This construction seems to be in harmony with the intention of the framers of the amendment to section 13 embodying the above-mentioned proviso.

The act of June 21, 1917, amending section 13 and other sections of the Federal reserve act, as originally introduced in both the House and Senate, contained no part of the (second) proviso, the section in the proposed amended form ending with the preceding proviso. The Senate, adopting an amendment offered by Senator Hardwick, added the second proviso in the following form:

"Provided further, That nothing in this or any other section of this act shall be construed as prohibiting a member or nonmember bank from making reasonable charges, but in no case to exceed 10 cents per \$100 or fraction thereof, based on the total of checks and drafts presented at any one time, for collection or payment of checks and drafts and remission therefor by exchange or otherwise." [55 Cong. Rec. 1988.]

It was thought the effect of the Hardwick amendment would be to recognize the right of any bank upon which checks are drawn to make charges against the Federal reserve bank through which such checks might be cleared or collected. The Hardwick amendment was opposed by the Federal Reserve Board, as appears from letters from its governor to Senator Owen and Congressman Glass, chairmen of the respective Committees on Banking and

Currency of the Senate and House. (Pp. 1984, 3527.) The President also called attention to the seeming effect of the amendment in a letter to Senator Owen, reading as follows:

"I have been a good deal disturbed to learn of the proposed amendment to the Federal reserve act which seems to contemplate *charging the Federal reserve banks for payment of checks cleared by them*, or charging the payee of such checks passing through the reserve banks with a commission. I should regard such a provision as most unfortunate and as almost destructive of the function of the Federal reserve banks as a clearing house for member banks, a function which they have performed with so much benefit to the business of the country.

"I hope most sincerely that this matter may be adjusted without interfering with this indispensable clearing function of the banks." [P. 3761.]

In conference, apparently as the result of the letters of the governor of the Federal Reserve Board and the President, the proviso took its present form, two changes being made by the conferees: *First*, the charges which member or nonmember banks may make were made subject "to be determined and regulated by the Federal Reserve Board;" and *second*, the final clause was added, "but no such charges shall be made against the Federal reserve banks."

In presenting the conference report to the Senate, Senator Owen emphasized the importance of not interfering with the clearing functions of the Federal reserve banks, explained that under the proviso as amended—

"the banks can charge each other for making these accommodations if they like, and they can adjust that to their own satisfaction with one another, without troubling the reserve banks,"—

and apparently conceded that State banks not connected as members or depositors with the Federal reserve system could not be subjected to Federal legislation. [P. 3761.]

Mr. Glass, in presenting the report to the House, said:

"The Congress has no control whatsoever over non-member banks. It can not regulate their charges, and

will not regulate them if this Hardwick amendment should prevail. * * * This House has no control over the nonmember bank in this matter. Even the Federal Reserve Board has no control over their operations unless they voluntarily join the voluntary collection system established by the Federal Reserve Board." [P. 3526.]

And further:

"No nonmember bank that does not voluntarily join the collection system established by the Federal Reserve Board will be specifically affected. No law that we pass here can directly affect them. The only way they can be affected is incidental." [P. 3528.]

It thus seems clear that the proviso was understood by Congress as designed to protect the clearing functions of the Federal reserve banks, and not directed at State banks which have no connection as members or depositors with the Federal reserve system, and upon which it was considered the effect of the proviso could be only incidental.

It may be urged, and is probably true, that the proviso will necessarily affect the practice of State banks, though not members or depositors, as to making charges for the payment of checks drawn upon them. With the concentration of reserve balances in Federal reserve banks as required by the Federal Reserve Act, the Federal reserve clearing system may offer the only adequate and convenient facilities for clearing or collecting checks drawn upon banks at a distance, and depositors may find it inadvisable to maintain accounts with banks upon which checks can not be cleared or collected by the use of these facilities.

The Federal reserve act, however, does not command or compel these State banks to forego any right they may have under the State laws to make charges in connection with the payment of checks drawn upon them. The act merely offers the clearing and collection facilities of the Federal reserve banks upon specified conditions. If the State banks refuse to comply with the conditions by insisting upon making charges against the Federal reserve banks, the result will simply be, so far as the Federal Reserve Act is concerned, that since the Federal reserve banks

can not pay these charges they can not clear or collect checks on banks demanding such payment from them.

From what has been said it follows that, in my opinion, the limitations contained in section 13, relating to charges for the collection and payment of checks, do not apply to State banks not connected with the Federal reserve system as members or depositors. Checks on banks making such charges can not, however, be cleared or collected through Federal reserve banks.

Respectfully,

T. W. GREGORY.

TO THE PRESIDENT.

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION.

Under section 32 of the Federal Workmen's Compensation Act of September 7, 1916 (39 Stat. 749), the United States Employees' Compensation Commission has power, when the question is properly presented, to decide whether employees of the United States Shipping Board Emergency Fleet Corporation, or other persons, are entitled to the benefits of the provisions of said Act.

DEPARTMENT OF JUSTICE,

March 21, 1918.

SIR: I have the honor to acknowledge the receipt of your letter of January 16, 1918, inclosing a communication from the chairman of the United States Employees' Compensation Commission, which requests an opinion on the question therein submitted. This question is whether the commission, under section 32 of the act creating it, has authority "to determine whether persons or classes of persons are, under the terms and conditions of their employment, civil employees of the United States for the purpose of receiving compensation on account of injuries under the act of September 7, 1916." (39 Stat. 742, 749, c. 458.) A subsequent letter of February 2, 1918, received from the chairman of the commission in response to my request that he be more specific, adds a supplementary and concrete question as to the authority of the commission to decide whether employees of the United States Shipping Board Emergency Fleet Corporation are entitled to the benefits of the provisions of the act mentioned.

Section 32 of the act in question is as follows:

"That the commission is authorized to make necessary rules and regulations for the enforcement of this Act, and shall decide all questions arising under this Act."

Not only the language of this section but the scope and character of the act itself make it clear that the terms employed were used in no narrow or technical sense. By the act of May 30, 1908, 35 Stat. 556, c. 236, compensation had been provided for employees of the United States injured in the course of hazardous employment, and by the act now in question Congress undertook to extend a similar privilege to all civilian employees of the United States. The earlier act was administered first by the Secretary of Commerce and Labor and afterwards by the Secretary of Labor; while by the present act similar duties are confided to the commission. In neither act was Congress undertaking to modify or supplant rights which had theretofore existed at common law, but was, as a matter either of grace or natural justice, extending to injured employees of the Federal Government for the first time the right to compensation for injuries received in the course of their employment. Instead of remitting them to the processes of the courts for their relief it followed the wise practice of similar statutes in other jurisdictions and committed to the executive officer in the earlier act and to an administrative board in the later the duty of acting as the sole arbiter between the Government on the one hand and the injured employee on the other. To the present board there was confided accordingly, in language quite familiar in recent statutes, the power to "make necessary rules and regulations for the enforcement of this Act"; thus giving to it the power to fill up the details which Congress deemed it unnecessary to set forth at length (*United States v. Grimaud*, 220 U. S., 506), and to govern its own agencies and proceedings after the fashion prescribed in Revised Statutes, section 161, for the heads of executive departments.

The commission was likewise empowered to "decide all questions arising under this Act." Terms so familiar need no definition, and it is quite obvious that they are to be taken in their ordinary and colloquial meaning. To de-

cide is to render judgment, or, as the Supreme Judicial Court of Massachusetts in *Commonwealth v. Anthes*, 5 Gray, 185, 253, puts it, "'to decide' includes the power and right to deliberate, to weigh the reasons for and against, to see which preponderate, and to be governed by that preponderance"; while all questions which springing from the act involve its construction or application necessarily arise under it.

It is the commission, therefore, which must determine whether the claimant has or has not been injured while in the performance of his duty or as a result of his own willful misconduct or intoxication; whether his disability is total or partial in character; whether upon review the amount awarded shall be increased or diminished; how it shall be apportioned among the beneficiaries; and when it may be commuted for cash, etc. But before any of these questions can come on for disposal it must first of all appear that the claimant is an employee of the United States, and this basic fact the commission must decide at the very threshold.

I have no hesitation, therefore, in concluding that the commission has power when the question is properly presented to decide whether employees of the United States Shipping Board Emergency Fleet Corporation, or other persons, are entitled to the benefits of the provisions of the act.

To this general conclusion, however, certain qualifying considerations may properly be added. Section 36 of the act provides with somewhat more detail than elsewhere appears for the manner in which the conclusions of the commission shall be delivered. This section is as follows:

"The commission, upon consideration of the claim presented by the beneficiary, and the report furnished by the immediate superior and the completion of such investigation as it may deem necessary, shall determine and make a finding of facts thereon and make an award for or against payment of the compensation provided for in this Act. Compensation when awarded shall be paid from the employees' compensation fund." (39 Stat. 749).

The propriety, therefore, of any expression by the commission or its individual members as to the rights of any persons or class of persons in advance of the presentation of a specific claim may well be doubted. Such an expression would certainly be informal in character, could give rise to no substantive rights in any individual, and could have no binding future force upon the commission or its members. In view of the diversities which constantly appear among cases which upon first impression seem of the same general character the unwisdom of dealing with them in the mass would seem to be apparent.

I express no opinion, none being requested, as to the merits of the questions with which the commission is confronted nor as to the finality of its decision and the manner in which it could be reviewed, if at all, either by the Government or by a rejected claimant.

Respectfully,

T. W. GREGORY.

TO THE PRESIDENT.

STAMP TAX ON THE BORROWING AND RETURN OF STOCK.

The stamp tax imposed by sections 800 and 807, Schedule A, subdivision 4, of the War-Revenue Act of October 3, 1917 (40 Stat. 319, 322), applies to the so-called borrowing and return of shares or certificates of stock.

DEPARTMENT OF JUSTICE,

March 23, 1918.

SIR: I have the honor to acknowledge your letter of the 14th instant requesting my opinion on the question whether the stamp tax imposed by sections 800 and 807, Schedule A, subdivision 4 of Title VIII of the War-Revenue Act of October 3, 1917 (40 Stat. 319, 322), applies to the so-called borrowing and return of shares or certificates of stock.

The said subdivision levies a tax—

“On all sales, or agreements to sell, or memoranda of sale or deliveries of, or transfers of legal title to shares or certificates of stock * * * whether made upon or shown by the books of the association, company, or corporation, or by any assignment in blank, or by any delivery, or by

any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock or not * * *: *Provided*, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of stock certificates as collateral security for money loaned thereon, which stock certificates are not actually sold, nor upon such stock certificates so deposited: *Provided further*, That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer, for whom and upon whose order he has purchased same * * *."

Your letter makes the following further statement:

"The transactions as to which the question arises are described as follows:

"The borrowing of shares is necessary in connection with all so-called short sales. It is also necessary in connection with shares that are sold but are not on hand for delivery, an instance of which is the shares being in transit from abroad, or the West, or elsewhere. It also frequently happens that a broker may sell shares for an estate and find upon attempting to transfer them from the name of a decedent or an executor, that additional papers, or authority, are required by the transfer office, or the transfer books may be closed for a meeting of stockholders or other reasons; and the shares being already sold, the broker borrows to make delivery, later replacing the borrowed shares.

"In the case of the short sale transaction the following occurs:

"A sells to B one hundred shares of stock which is evidenced by memorandum of sale. Under the rules of the exchange the shares have to be delivered and paid for the day following. If the sale is a short sale or the shares are not on hand for delivery A applies to C, who has such shares on hand, for a loan of them. C being willing to lend them delivers to A a certificate for one hundred shares endorsed in blank on A's agreement to re-deliver to him an equivalent number of shares on demand on any business day and the deposit by A with C of the market value of the shares as security for their return. That deposit re-

mains until the shares are returned, subject to increase from day to day if the market value of the shares rises, and to decrease from day to day if the market value of the shares falls. A makes his delivery under his transaction with B by delivering the certificate which he has borrowed from C for that purpose, thereby completing the transaction between A and B on which the tax is paid. When A desires to return the shares which he has borrowed, A goes into the market and buys one hundred shares for the purpose of delivering them to C, and on that transaction the tax is paid. These shares so acquired for delivery to C he delivers to C and receives the amount he has on deposit with C. It is a common occurrence that C demands the return of his shares in which event A substitutes D as another lender, going through the same process, including the deposit of the value of the shares, as with C, thus delivering to C the shares he has borrowed from D for that purpose, and receiving from C the amount on deposit with him as security for such return. This process may be repeated many times in respect of the same short sale.

“The stamp tax provided for in the subdivision above quoted of course applies to the sale and delivery of any borrowed shares and to the purchase of shares for the purpose of returning them to a lender. The precise question upon which opinion is desired is as to whether the stamp tax also applies to the passing from the lender to the borrower of shares or certificates of stock ‘borrowed’ and also to the passing from the borrower to the lender of shares or certificates of stock ‘returned’.”

You inclose a copy of an opinion rendered you by the Solicitor of Internal Revenue to the effect that the transfer of the stock from the lender to the borrower, and later from the borrower to the lender in fulfillment of the former's obligation, are both subject to the tax. With this conclusion I agree for the following reasons:

1. The act by its express terms, it will be observed, covers every transfer of the legal title to shares of stock with certain specific exceptions. There can certainly be no doubt that there is a transfer of the legal title from the lender to

the borrower and later from the borrower to the lender under the circumstances stated. Shares of stock are fungible things, and their loan with an agreement to return things of the same class is the mutuum of Roman law, as to which no one can doubt that title passed from the lender to the borrower and vice versa. (Jones on Pledges, page 64; Story on Bailments, 7th ed., sections 283, 284; Kent's Commentaries, 12th ed., Vol. II, p. 573; *Hurd v. West*, 7 Cowen (N. Y.) 752, 756). Even if the article be mingled with others of the same species in a warehouse, title may pass to the warehouseman. (Kent's Commentaries, 12th ed., Vol. II, p. 590, Justice Holmes' note; *South Australian Ins. Co. v. Randell, L. R.*, 3 Privy Council Appeals 101; *Rahilly v. Wilson*, 3 Dillon 420). Upon the same principle title to deposits in bank passes to the banker. (*Foley v. Hill*, 2 House of Lords Cas. 28). The Supreme Court has had occasion to pass upon this characteristic of shares of stock in several cases. (*Richardson v. Shaw*, 209 U. S. 365; *Sexton v. Kessler*, 225 U. S. 90; *Gorman v. Littlefield*, 229 U. S. 19, 23; *National City Bank v. Hotchkiss*, 231 U. S. 50; *Duel v. Hollins*, 241 U. S. 523; and see as to bonds *United States and Mex. T. Co. v. Kansas City, M. & O. Ry. Co.* 240 Fed. 505). In *Gorman v. Littlefield*, the court held:

"* * * that a certificate for the same number of shares represented precisely the same kind and value of property as another certificate for a like number of shares in the same corporation; that the return of a different certificate or the substitution of one certificate for another made no material change in the property right of the customer; that such shares were unlike distinct articles of personal property, differing in kind or value, as a horse, wagon or harness, and that stock has no earmark which distinguishes one share from another, but is like grain of a uniform quality in an elevator, one bushel being of the same kind and value as another. * * *"

The effect of these decisions is undoubtedly that even in the case of a broker and his customer the legal title to the stock is, not nominally, but really, in the broker, if the course of business so requires, although the customer may

retain, as against the broker and his trustee in bankruptcy, an equitable right in rem to stock in the broker's possession of the same species as that dealt in between them.

In accordance with this same general principle, it is specifically held that a loan of stock transfers title (*Dykers v. Allen*, 7 Hill (N. Y.) 497; *Barclay v. Culver*, 30 Hun (N. Y.) 1; *Fosdick v. Greene*, 27 Ohio St. 484; Dos Passos on Stockbrokers, 2nd ed., p. 329).

2. It can not be said that the borrower is a mere agent between the lender and the vendee, so as to make what is in appearance two transactions in reality only one. There is no privity between the lender and the vendee. The former looks merely to the borrower and assumes no relationship further. There are, therefore, in substance, two transactions, a transfer by the lender to the borrower, and a transfer by the latter to the vendee, and the tax must be paid on each. The case, in this aspect of it, is governed by *Municipal Telegraph and Stock Co. v. Ward*, 133 Fed. 70, affirmed 138 Fed. 1006, and *Eldridge v. Ward*, 174 Fed. 402, and not by *United States v. Clawson*, 119 Fed. 994; *Metropolitan Stock Exchange v. Gill*, 199 Fed. 545, s. c. 211 Fed. 108, and *Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424.

3. As for the provisos in subdivision 4, they should receive a fair interpretation in connection with the whole, but there must be clear language before it can be assumed that exemption from taxation was intended. (*Cornell v. Coyne*, 192 U. S. 418, 431; *Ford v. Delta and Pine Land Co.*, 164 U. S. 662, 666; *Central Railroad & Banking Co. v. Georgia*, 92 U. S. 665, 674; *Bailey v. Magwire*, 22 Wall. 215, 226.) The first proviso deals with deposits of stock as collateral security for a loan, and the second with the transfer of stock between a broker and his customer. Under no fair interpretation can either be held to cover the loan of stock under the circumstances now under consideration.

A loan of stock can not be called a pledge thereof within the meaning of the first proviso. The transaction is, in effect, the reverse of that covered by the proviso. In the latter case, money is loaned, and stock is deposited as collateral for its return. In the case now in question stock is

loaned and *money* is deposited as *collateral* for its return. In one case the debt is money, in the other stock. (See *Dibble v. Richardson*, 171 N. Y. 131, 137.) There can, of course, be no doubt that the legal title *to the money* loaned passes in a real sense in the case covered by the proviso, and for the same reason legal title *to the stock* loaned in the present case passes with like reality to the borrower.

As to the second proviso, it is sufficient to say that the relationship between the lender and the borrower in the present case is not, in any sense, that of a broker buying and selling stocks for a customer.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE SECRETARY OF THE TREASURY.

CESSION OF STATE JURISDICTION—KANSAS.

The reservation by the State in the Kansas law of concurrent jurisdiction over sites within the State acquired by the Federal Government for public buildings is incompatible with the consent required by section 355 of the Revised Statutes.

DEPARTMENT OF JUSTICE,
April 5, 1918.

SIR: I have the honor to reply to your letter dated March 13, 1918, calling my attention to sections 4581, 4582, and 9216 of Dassel's General Statutes of Kansas, 1909, the relevant portions of which read as follows:

"SEC. 4581. That the United States shall have power to purchase or condemn in the manner prescribed by law, upon making just compensation therefor, any land in the State of Kansas required for customhouses, arsenals, national cemeteries, or for other purposes of the government of the United States." (Laws 1872, ch. 135, sec. 1; Mar. 28.)

"SEC. 4582. The United States may enter upon and occupy any land which may have been or may be purchased or condemned or otherwise acquired, and shall have the right of exclusive legislation and concurrent jurisdiction together with the State of Kansas over such land and the

NOTE.—Opinion of March 28, 1918, relating to Loans by Federal Land Banks, p. 605.

structures thereon, and shall hold the same exempt from all state, county and municipal taxation." (Id. sec. 2.)

You request my opinion in regard to the extent of the concurrent jurisdiction reserved by the State as set forth in these laws and whether such legislation sufficiently provides for cession of jurisdiction over land acquired in Kansas for Federal building sites in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States.

Your letter does not inform me of any contemplated official action for the guidance of which an answer to your question as framed is requisite. By section 355, Revised Statutes, it is provided in part that no public money shall be expended upon any site or land purchased by the United States for the purpose of erecting thereon any armory, arsenal, fort, fortification, navy yard, customhouse, light-house, or other public building of any kind whatever * * * until the consent of the legislature of the State in which the land or site may be to such purchase has been given. It has been settled that the "consent" required by section 355 is that contemplated and spoken of in article 1, section 8, paragraph 17 of the Constitution (24 Op. 619); that it must be free from qualifications, conditions, or reservations inconsistent with the exercise by the Congress of "exclusive legislation" over the place ceded. I therefore assume that you desire to be advised whether, having regard to the prohibition in section 355 (*supra*), public money under your control may be expended for Federal buildings on sites acquired for that purpose in the State of Kansas.

In 1891 one of my predecessors, having under consideration an act of Congress appropriating money for a public building in Kansas but forbidding its expenditure until "the State of Kansas shall have ceded to the United States exclusive jurisdiction" with certain exceptions, held that the provision of the Kansas statute "that the United States shall have the right of exclusive legislation and concurrent jurisdiction together with the State of Kansas," was not in compliance with the requirements of the act of Congress. (20 Op. 242; cf. 20 Op. 298.)

My attention, however, is called to a later opinion (24 Op. 617) dealing with an act of the Legislature of Louisiana, the first section of which is nearly identical with the first section of the Kansas act (*supra*). The second section of the Louisiana statute reads "that the United States may enter upon and occupy any land which may have been or may be purchased or condemned or otherwise acquired, and shall have the right of exclusive jurisdiction over the property so acquired during the time that the United States shall be or remain the owner thereof for all purposes *except the administration of the criminal laws of the State* * * *."

It will be observed that the Kansas Legislature seeks to qualify the cession by a reservation of "concurrent jurisdiction." The Louisiana act reserves to the State "the administration" of her "criminal laws."

It has been settled that unequivocal "consent" by the State to the purchase of lands by the United States for purposes within paragraph 17 has the constitutional consequence of transferring "exclusive jurisdiction." (*Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S. 525, 533.) Construing the Louisiana act, Attorney General Knox thought that by the first section consent to purchase or condemnation of lands was plainly and unequivocally given; that there was nothing in the second section or elsewhere to indicate that the reservation of jurisdiction which it contained was made an *express* condition of the consent. He was therefore of opinion that exclusive jurisdiction over the site in question within the requirements of section 355 had passed to the United States freed from the unacceptable reservation contained in section 2. It was also his opinion that the precedents leading to a contrary conclusion found in 20 Op. 613, 298, 242; 8 Op. 418, 102, should be distinguished.

I am not disposed to follow this opinion, however; and therefore hold in accordance with the opinion of Attorney General Miller, 20 Op. 242, referred to above, that the reservation by the State in the Kansas law of concurrent jurisdiction over sites within the State acquired by the Federal Government for public buildings is incompatible

with the consent required by section 355, Revised Statutes.

I suggest that, as recommended by the Solicitor of the Treasury, an effort be made to secure the passage of legislation giving consent to the acquisition of Federal building sites in Kansas free from questionable qualifications or reservations.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

CESSION OF STATE JURISDICTION—MINNESOTA.

The reservation of the right to punish offenses against State laws committed on lands acquired for Federal building sites embraced in a cession act of Minnesota is incompatible with the exercise of the exclusive jurisdiction contemplated by section 355 of the Revised Statutes.

DEPARTMENT OF JUSTICE,

April 5, 1918.

SIR: I have the honor to reply to your letter of March 7, 1918, in which you invite attention to sections 4, 5, and 6 of chapter 1, General Laws of Minnesota, 1913, and request my opinion as to the sufficiency of this legislation to provide for cession of exclusive jurisdiction over lands in Minnesota acquired for Federal building sites in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States.

For reasons indicated in my reply to your letter in regard to similar legislation of the State of Kansas, I do not reply to your inquiry as framed but confine my opinion to the question whether, having regard to the language of section 355, Revised Statutes, public money under your control may be expended for the erection of Federal buildings on sites acquired for that purpose in Minnesota. Section 355 reads in part as follows:

“No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy yard, customhouse, lighthouse, or other public building of any kind whatever, until the written opinion of the

Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be to such purchase has been given."

So much of the applicable law of Minnesota as it is necessary to consider reads:

"SEC. 4. Jurisdiction is hereby ceded to the United States over all places within this State heretofore acquired by it for national purposes, subject to the right of the State to cause its civil and criminal processes to be executed therein, and to punish offenses against the laws of the State committed on the premises so acquired. And consent is hereby given to the acquisition by the United States of any other place within the State hereafter desired for any purpose authorized by Congress, subject to the concurrent jurisdiction aforesaid, upon condition, however, that application therefor shall be made to the governor by an authorized officer of the United States, setting forth a description of the premises acquired, with a map thereof, when necessary to their proper designation."

Regarding that portion of the law which purports to cede jurisdiction over places acquired before its passage, it will be observed that the "consent" of the State to purchase is not granted in formal phrases. "*Jurisdiction*" is ceded *subject* to the right "to punish offenses against the laws of the State committed on the premises so acquired." It has been decided that a State may effectually annex to an act of cession qualifications which subtract from the exclusive authority which the United States shall exercise over the place ceded. (*Palmer v. Barrett*, 162 U. S. 399.) A reservation of this sort is, however, incompatible with the exercise of the exclusive jurisdiction contemplated and required in section 355.

The remaining portion of the section quoted gives "consent" to future acquisitions by the United States subject to the same reservation; that is to say, of the right to punish offenses against the laws of the State committed on the premises acquired. Where the consent expressed is coupled with a reservation of this character, I am of opinion that it fails to satisfy the requirements of the Federal

law. (20 Op. 611.) It is therefore suggested that an effort be made to secure, in accordance with the recommendations of the Solicitor of the Treasury, passage by the Legislature of Minnesota of an act of consent which will be free from any reservations, qualifications, or conditions inconsistent with the exercise by the United States of the exclusive jurisdiction contemplated in section 355.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

CESSION OF STATE JURISDICTION—ILLINOIS.

The reservation by the State of Illinois of the right to administer its criminal laws upon the lands acquired by the United States for Federal building sites does not comply with the requirements of section 355 of the Revised Statutes.

The reservation of the right to serve and execute State process on territory ceded to the United States is premissible and not inconsistent with the exclusive Federal authority required by section of 355 of the Revised Statutes.

DEPARTMENT OF JUSTICE,
April 8, 1918.

SIR: I have the honor to reply to your letter of March 2, 1918, calling attention to paragraphs 11420, 11421, 11429, 11430, and 11431 of chapter 143, Illinois Statutes, Annotated, 1913, volume 6. I quote from the latter enactment taken from the Illinois act of April 11, 1899 (Laws of Illinois, p. 375), as follows:

"Par. 11429. That the consent of the State of Illinois is hereby given, in accordance with the sixteenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this State required for customhouses, courthouses, post offices, arsenals, or other public buildings whatever, or for any other purposes of the Government.

"Par. 11430. That exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes except the administration of the criminal laws and the serv-

ice of all civil processes of this State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.

“Par. 11431. The jurisdiction hereby ceded shall not vest until the United States shall have acquired the title to the said lands by purchase, condemnation, or otherwise; and so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continued exempt and exonerated from all State, county, and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this State.”

For reasons stated in my reply to your letter in regard to similar legislation in the State of Kansas, I confine my opinion to the question whether, having regard to the language of section 355, Revised Statutes, public money under your control may be expended on sites acquired for that purpose in Illinois. Section 355 reads in part as follows:

“No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy yard, customhouse, lighthouse, or other public building, of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be to such purchase has been given.”

The questionable portion of this legislation is the language in paragraph 11430 excepting from the cession of exclusive jurisdiction “the administration of the criminal laws” of the State.

In *State v. Mack*, 23 Nev. 359, 62 Am. St. Rep. 811, 816, defendant was indicted in a State court of Nevada for an offense committed within the limits of a Federal post office. Passing on a special plea interposed to the jurisdiction of the court, the Supreme Court of Nevada held that the Federal jurisdiction was exclusive. The language of the act of cession under consideration was nearly identical with that of the Illinois statute, *supra*. The court said:

"Considering the legislative intention manifested in various acts, above cited, and that Congress and the legislature must have had in view the provisions of article 1, section 8, of the Federal Constitution in the passage of said acts, a reasonable and fair construction to be placed upon the provision reserving to the State the 'administration of the criminal laws' thereof, is simply the reservation to the State of the right to execute criminal process upon the lands purchased for violation of the laws of the State, committed within the State, and without the purchased lands."

Two of my predecessors (24 Op. 619; 20 Op. 613) reached a contrary conclusion, holding that a reservation to the State of the right to administer its criminal laws in the place purchased is inconsistent with the exercise of exclusive jurisdiction thereover by Congress as it leaves to the State the cognizance of offenses against its laws committed thereon as fully as the same existed before such acquisition.

Reservation of right to *serve* and *execute* both civil and criminal processes in ceded places has always been held permissible, and it is customary and usual for State legislatures to employ in acts of cession language to safeguard this right. The use in the same sentence of the word "administration" in connection with the reservation in regard to the criminal laws is in contrast with the word "service" in connection with civil processes and leads to the conclusion that they were not employed in the same sense.

It should be remembered also that Congress, in frequent instances, has permitted in special acts the erection of Federal buildings conditioned upon cession of exclusive jurisdiction "except the administration of the criminal laws of the State." Attorney General Olney was of the opinion that by force of this exception there was left to the State cognizance of criminal offenses against its laws in the place ceded. It seems reasonable to infer that the Nevada statute, as well as that of Illinois, was passed in the expectation that Congress, in providing for public buildings in those States, might permit the continued

operation of the local criminal law within the places purchased for the purpose.

Faced with these manifestly divergent constructions of the language in question, I abandon the effort to reconcile them, and am content, for the purposes of administration, to advise you that the Illinois statute does not comply with the requirements of section 355. I suggest, in agreement with the recommendation of the Solicitor of the Treasury, that an effort be made to procure the passage of an act of cession freed from any questionable reservations.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

MONEY BENEFITS—INMATES OF THE NAVAL HOME.

The money benefits provided for in section 4756 of the Revised Statutes are "pensions" within the purview of section 4813 of the Revised Statutes and the pertinent provision of the Act of June 30, 1914 (38 Stat. 398), and such money benefits inure to the grantees concurrently with maintenance in the Naval Home. Allowances under sections 4756 and 4757 of the Revised Statutes do not fall within the prohibition of section 4715 of the Revised Statutes, and may therefore be paid in addition to a pension under the general pension laws.

Allowances under section 4757 of the Revised Statutes are "pensions" within the meaning of section 4813 of the Revised Statutes and the said Act of June 30, 1914, and should therefore be disposed of, in cases where the beneficiaries are inmates of the Naval Home, in the manner prescribed by that Act.

DEPARTMENT OF JUSTICE,

April 11, 1918.

SIRS: I have the honor to reply to your respective communications of December 4, 1917, and November 14, 1917, in which the Secretary of the Interior refers to the previous letters from his Department, dated April 30, 1917, and October 11, 1917, and renews and amplifies his request for my opinion respecting the meaning of the word "pensions" in various statutes, and in which the Secretary of the Navy, also referring to previous correspond-

ence, makes the point that the questions asked by the Secretary of the Interior do not arise in the administration of the Interior Department, but are of exclusive concern to the Navy Department, and therefore do not afford any basis for an opinion by me inasmuch as the Secretary of the Navy has not requested one.

My ability to comply with the progressive requests of the Secretary of the Interior is necessarily conditioned upon whether or not the questions propounded by him can be properly regarded as arising in the Interior Department, since the jurisdiction of the Attorney General to give advice to heads of Departments extends only to the consideration of questions which arise in the Department which requests his advice—a limitation of general application which the letter of the Secretary of the Navy in the particular instance but serves to illustrate and emphasize. On this ground I declined, in my official opinion of June 12, 1917 (31 Op. 127), addressed jointly to the Secretary of the Navy and the Secretary of the Interior, and in my letter of October 7, 1917, to the Secretary of the Interior, to express any opinion upon such of the questions as were on those occasions before me on the submission of the Interior Department. In the light of the whole correspondence as now developed, however, I am of the opinion that the questions asked by the Secretary of the Interior may be regarded as arising in his Department, since the Department of the Navy and the Interior Department are jointly concerned in the administration of the several statutes out of which the questions grew. I therefore feel at liberty at this time to comply with the request of the Secretary of the Interior for my opinion.

The fundamental propositions of fact upon which the submission rests appear to be as follows:

- (1) Among the inmates of the Naval Home, Philadelphia, are a number of persons who have been certified by the Secretary of the Navy as entitled to allowances under section 4756, Revised Statutes, or section 4757, Revised Statutes.

- (2) The names of a number of persons certified as above are borne on the pension roll as also receiving a pension

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under general pension laws (e. g., act of May 11, 1912, 37 Stat. 112; R. S. secs. 4692-4701, both inclusive).

(3) Payment of allowances under section 4756, Revised Statutes, is being withheld by the Commissioner of Pensions for periods during which the grantees are maintained at the Naval Home (or at the naval hospital on the Naval Home grounds), but is being made to the grantees of the allowances for periods when they are not so maintained, regardless of the fact that they may also be recipients of pensions under general pension laws.

(4) Allowances under section 4757, Revised Statutes, are being paid by the Commissioner of Pensions directly to the beneficiaries, whether or not they are also maintained in the Naval Home, and regardless of the fact that they may be receiving, in addition, a pension under general pension laws.

Upon these facts the following questions arise, with respect to which the Interior Department desires my advice:

(1) Are the money benefits provided for in section 4756, Revised Statutes, within the purview of the word "pension" in section 4813, Revised Statutes?

(2) Are the money benefits provided for in section 4756, Revised Statutes, within the purview of the term "pensions" as used in the naval appropriation act of June 30, 1914 (38 Stat. 392, 398), which provided " * * * That the pensions of beneficiaries of the Naval Home shall be disposed of in the same manner as perscribed for inmates of the Soldiers' Home, * * * under such regulations as the Secretary of the Navy may prescribe * * * " ?

(3) Do such money benefits inure to the grantees concurrently with maintenance in the Naval Home?

(4) Can allowances under section 4756, Revised Statutes, or section 4757, Revised Statutes, and a pension under general pension laws both be paid in view of section 4715, Revised Statutes?

(5) Should allowances granted by the Secretary of the Navy under section 4757, Revised Statutes, to persons

who are inmates of the Naval Home be paid as at present directly to the beneficiaries (as not being within the purview of section 4813, Revised Statutes) or should they be paid, pursuant to section 4813 and the act of June 30, 1914, to the governor of the Naval Home for the use of the grantees?

1 and 2. The first two of these questions can be best considered and answered together.

Section 4756, Revised Statutes, as amended December 23, 1886 (24 Stat. 353), provided that there should be paid quarterly to every disabled enlisted man and petty officer in the Navy or Marine Corps who has served 20 years a sum equal to half pay, *in lieu of maintenance in the Naval Home at Philadelphia*, if he so elects. The section further provided that "applications for such pension shall be made to the Secretary of the Navy, who, upon being satisfied that the applicant comes within the provisions of this section, shall certify the same to the Commissioner of Pensions, and such certificate shall be his warrant for making payment as herein authorized."¹

Section 4813, Revised Statutes, as amended May 4, 1898 (30 Stat. 369, 377), and March 3, 1899 (30 Stat. 1024, 1027), provided that—

"Whenever any officer, seaman, or marine entitled to a pension is admitted to the Naval Home at Philadelphia, or to a naval hospital, his pension, while he remains there, shall be deducted from his accounts and paid to the Secretary of the Navy for the benefit of the fund from which such home or hospital, respectively, is maintained."

¹ The full text of the section, as amended, is as follows:

"There shall be paid out of the naval pension fund to every person who, from age or infirmity, is disabled from sea service, but who has served as an enlisted person or as an appointed petty officer, or both, in the Navy or Marine Corps for the period of twenty years, and not been discharged for misconduct, *in lieu of being provided with a home in the Naval Asylum, Philadelphia* (now called the Naval Home), if he so elects, a sum equal to one-half the pay of his rating at the time he was discharged, to be paid to him quarterly, under the direction of the Commissioner of Pensions; and applications for such pension shall be made to the Secretary of the Navy, who, upon being satisfied that the applicant comes within the provisions of this section, shall certify the same to the Commissioner of Pensions, and such certificate shall be his warrant for making payment as herein authorized."

In the administration of the law as embodied in these statutes the question naturally arose whether allowances granted by the Secretary of the Navy under section 4756, Revised Statutes, should stop absolutely upon the grantee's admission to the Naval Home, or whether they should continue to be granted and credited to the grantee's account with the home and then deducted and paid over to the Secretary of the Navy for the benefit of the fund from which the home is maintained. This depended upon whether such allowances were "pensions" within the meaning of section 4813, Revised Statutes. The question was of no practical importance, because the result to the Treasury was the same in either case. As a matter of fact, the Navy Department and the Interior Department both acted on the view that such allowances *were* pensions within the meaning of section 4813, Revised Statutes, the Secretary of the Navy continuing to grant the allowances after the grantee's admission to the home, and the Commissioner of Pensions paying the same to the Secretary of the Navy (or the governor of the Naval Home) for the benefit of the fund from which the home is maintained, as provided in section 4813.

By the act of June 30, 1914 (38 Stat. 392, 398), Congress provided that "*pensions* of beneficiaries of the Naval Home shall be disposed of in the same manner as prescribed for inmates of the soldiers' home," i. e., paid to the wife, children, or parents of the inmates, or to the treasurer of the home in trust for the inmates, according as the latter may direct.

The question now arose whether allowances under section 4756, Revised Statutes, were "pensions" within the meaning of *this* act. This time it made a difference how the question was answered, since if such allowances were treated as "pensions" within the meaning of the act of June 30, 1914, they would not go back into the Treasury upon the grantee's admission to the Naval Home, as under section 4813, Revised Statutes, but would either be held in trust for the grantee or go to his wife, children, or parents. The conclusion was reached in the Navy Depart-

ment that the allowances under section 4756, Revised Statutes, *were* pensions within the meaning of the act of June 30, 1914, while in the Interior Department the view was taken that such allowances were not within the purview of that act.

In my opinion the true construction of the scope of the act of June 30, 1914, is to be arrived at by reference to the scope of section 4813, Revised Statutes, which it supersedes so far as concerns the disposition of pensions of Naval Home inmates. The question whether allowances under section 4756, Revised Statutes, are pensions within the meaning of the act of June 30, 1914, therefore resolves itself into the inquiry whether they were such within the meaning of section 4813, Revised Statutes.

As heretofore stated, they were so treated by both the Navy Department and the Interior Department, and in accordance with that construction the Secretary of the Navy for many years *granted* the allowances provided for in section 4756, Revised Statutes, notwithstanding the grantee's admission to the Naval Home, and the Commissioner of Pensions paid them over to the Secretary of the Navy (or the governor of the Naval Home) for the benefit of the fund from which the home is maintained, as required by section 4813, Revised Statutes.

The papers before me do not show when this administrative practice originated, but they do show that it antedated June 11, 1894. The letter of the Acting Secretary of the Interior of October 11, 1917, states that—

“ * * * The Bureau of Pensions early adopted a practice of paying the allowances to the home, together with pensions properly payable under the law. * * * It was discontinued on June 11, 1894, and resumed on November 25, 1895, under orders of the Commissioner of Pensions. * * * In 1916, upon motion of the pension disbursing clerk, a question of its propriety was again raised, * * * ”

In a letter of the Commissioner of Pensions to the governor of the Naval Home, dated November 11, 1916, a

copy of which accompanied the letter of the Secretary of the Interior to me of April 30, 1917, it is said:

"* * * The practice has been for many years, with an interruption from June 11, 1894, to November 25, 1895, * * * to pay such allowances [i. e., allowances under section 4756] under section 4813, Revised Statutes, the same as allowances under general pension laws, for periods that the beneficiaries are maintained in the Naval Home, notwithstanding the allowances are in lieu of such maintenance, upon the understanding that the amounts so paid were repaid or turned into the naval pension fund."

The practice is recognized and commented upon in a decision of the Interior Department of June 25, 1901 (11 P. D. 410, 417), where it is said:

"* * * It may be a question of some moment whether the said money benefit can be properly paid to anyone during the time the beneficiary is an inmate of the asylum. This, however, is not a matter for consideration here, being exclusively within the jurisdiction of the Secretary of the Navy."

The Judge Advocate General of the Navy in his memorandum of December 4, 1917, which apparently has been approved by the Secretary of the Navy, and which accompanied the letter of that date from the Secretary of the Navy to me, says:

"* * * pensions under general laws and that provided for in section 4756 have always been treated in exactly the same manner so far as concerned inmates of the Naval Home; that is to say, these pensions have all, without discrimination, been paid to the Secretary of the Navy (or the governor of the Naval Home) for the benefit of the naval pension fund, from which said home is maintained."

Long-continued construction by one Department of the Government would have, under most circumstances, impressive force, but when it is thus concurred in for a long period by two Departments that force becomes compelling and a construction so firmly established ought not to be reversed except for the most imperative reasons, which cer-

tainly do not here exist. As was said in *Gilman v. Philadelphia*, 3 Wall. 713, 724:

"It is almost as important that the law should be settled permanently, as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil."

United States v. Finnell, 185 U. S. 236, 244, is also in point. The court in that case stated:

"It thus appears that the Government has for many years construed the statute of 1887 as meaning what we have said it may fairly be interpreted to mean, and has settled and closed the accounts of clerks upon the basis of such construction. If the construction thus acted upon by accounting officers for so many years should be overthrown, we apprehend that much confusion might arise. Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. (*United States v. Graham*, 110 U. S. 219; *Wisconsin C. R'd Co. v. United States*, 164 U. S. 190.) But if there simply be doubt as to the soundness of that construction—and that is the utmost that can be asserted by the Government—the action during many years of the Department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. (*Edwards v. Darby*, 12 Wheat. 206, 210; *United States v. Philbrick*, 120 U. S. 52, 59; *United States v. Johnson*, 124 U. S. 236, 253; *United States v. Alabama G. S. R'd Co.*, 142 U. S. 615, 621.) Congress can enact such legislation as may be necessary to change the existing practice, if it deems that course conducive to the public interests."

Moreover, while the above-described practice of treating allowances under section 4756, Revised Statutes, as "pensions" within the purview of section 4813, Revised Statutes, was in effect, Congress twice reenacted the latter section in identically the same language (so far as concerns the question here involved) by the act of May 4, 1898, and the act of March 3, 1899 (30 Stat. 369, 377; 30 Stat. 1024,

1027). The administrative construction which section 4813, Revised Statutes, had previously received in your respective Departments must therefore be considered as having been adopted by Congress. (*United States v. Falk*, 204 U. S. 143, 152; *United States v. Hermanos*, 209 U. S. 337, 339; 20 Op. 433, 436.)

I am, accordingly, of the opinion that the money benefits provided for in section 4756 are "pensions" within the purview of section 4813, and hence within the meaning of the provision hereinbefore quoted from the naval appropriation act of June 30, 1914.

3. From what has been said, it follows, also, that the third question set forth above, namely, whether allowances under section 4756 now inure to the grantees concurrently with maintenance in the Naval Home should be answered in the affirmative.

4. The further question is asked, whether allowances under section 4756 and section 4757 are "pensions" within the meaning of section 4715, prohibiting more than one pension at the same time to the same person.

The purport of section 4756 has already been stated. Section 4757, as amended December 23, 1886 (24 Stat. 353), provided, in substance, that every disabled person who has served as an enlisted man or petty officer, or both, in the Navy or Marine Corps *for a period not less than 10 years* and not been discharged for misconduct may apply to the Secretary of the Navy for aid from the surplus income from the naval pension fund, and the Secretary of the Navy is authorized to convene a board of naval officers, one of whom must be a surgeon, to examine into the condition of the applicant and to recommend a suitable amount for his relief, and for a specified time. The section further provides that upon approval of such recommendation by the Secretary of the Navy and certificate thereof to the Commissioner of Pensions the amount awarded shall be paid in the same manner as provided for in section 4756, Revised Statutes, in the case of persons who have served 20 years, but "no allowance so made shall exceed the rate of a pension for full disability corresponding to the grade

of the applicant, nor, if in addition to a pension, exceed one-fourth the rate of such pension."¹

Sections 4756 and 4757 are derived from section 6 of an act of March 2, 1867, chapter 174 (14 Stat. 515), entitled "An act to amend certain acts in relation to the Navy." Section 4715 was derived from the acts of June 6 and July 25, 1866 (14 Stat. 56; id. 230), and the act of March 3, 1873, chapter 234 (17 Stat. 566). The provision against double pensions as contained in the earlier of these two enactments was, therefore, on the statute book at the time of the passage of the act from which section 4756 and 4757 were drawn, and Congress must be presumed to have had knowledge of it when enacting the act of March 2, 1867, and to have intended the benefits therein provided for to be in addition to other pensions. The express language of section 4757, indeed, leaves little room to doubt that section 4715 is inapplicable to allowances granted under that section, since it embodies a congressional recognition that the allowances might be paid "in addition to a pension." But it has long been the settled construction in both of your Departments that allowances under section 4756 also are outside the purview of section 4715. In the case of *John Spencer (seaman)*, decided by the Assistant Secretary of the Interior, December 23, 1893, 7 P. D. 152, where this very question was considered, it was stated (154-155):

"So much of section 4715, R. S., as concerns the case of *Spencer* reads: 'Nothing in this title shall be so con-

¹ The full text of section 4757, Revised Statutes, as amended, reads as follows:

"Every disabled person who has served in the Navy or Marine Corps as an enlisted man or as an appointed petty officer, or both, for a period not less than ten years, and not been discharged for misconduct, may apply to the Secretary of the Navy for aid from the surplus income of the naval pension fund; and the Secretary of the Navy is authorized to convene a board of not less than three naval officers, one of whom shall be a surgeon, to examine into the condition of the applicant, and to recommend a suitable amount for his relief, and for a specified time, and upon the approval of such recommendation by the Secretary of the Navy, and certificate thereof to the Commissioner of Pensions, the amount shall be paid in the same manner as is provided in the preceding section for the payment to persons disabled by long service in the Navy; but no allowance so made shall exceed the rate of a pension for full disability corresponding to the grade of the applicant, nor, if in addition to a pension, exceed one-fourth the rate of such pension."

strued as to allow more than one pension at the same time to the same person.' Substantially the same provision is found in the acts of June 6 and July 25, 1866, and was in force at the date of the act of March 2, 1867 and has been ever since. (See also section 20, act of March 3, 1873; also, in this connection, Endlich on Interpretation, section 194, as to reenactments.)

"The act of March 2, 1867, was passed, it must be conceded, with full knowledge of Congress as to existing laws (Endlich on Interpretation, section 182). As no intention to substitute the pensions therein provided, for pensions granted by prior laws was expressed, none can be implied, and if both grants may subsist together, both must be upheld. (Ibid.) The last clause of the act expressly recognizes the right of a beneficiary to pension under earlier laws and, when he is receiving such, provides what proportion this later allowance shall bear to the earlier.

"But as providing other concurrent pensions for the same persons this act was repugnant to the legislation above referred to as afterward embodied in section 4715, R. S. As later conflicting legislation said act must be held to have superseded and impliedly repealed the previous inconsistent legislation, so far as its own execution was or is concerned, for contradictions can not stand together. (Ibid.)

"Sections 4756 and 4757 are undoubtedly to be construed *in pari materia* upon the question under immediate consideration. It would seem to be a violent and forced construction to hold that Congress intended to grant an allowance in addition to other pension to men, only, who had served ten years, and restrict that provided for those whose twice ten years of faithful service entitled them to larger consideration and reward, to such, only, as were not pensioned under other laws."

In view of the history of the several sections in question and of the long continued administrative construction which they have heretofore received, I am of opinion that section 4715 does not include within its purview the money benefits, allowances, or pensions provided for in sections 4756 and 4757. But I do not rest this conclusion upon the

ground suggested by the Acting Secretary of the Interior in his letter of October 11, 1917, "that the money benefits of section 4756 and 4757 are not pensions in ordinary acceptance and do not come within the purview of laws dealing with pensions in general"; and I am unable to concur in that portion of the opinion of Acting Attorney General Hoyt in 25 Op. 85, 87, cited in the letter of the Acting Secretary of the Interior, which deals with the nature of the money benefits awarded under those sections, the question whether they are "pensions" within the meaning of any particular statute being in my opinion a question of statutory construction rather than a question of hard and fast definition of the allowances as falling inside or outside the category of pensions. In this connection the language of Mr. Justice Holmes in the recent case of *Towne v. Eisner*, 245 U. S. 418, is pertinent. He said (425):

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. *Lamar v. United States*, 240 U. S. 60, 65."

I do not deem it necessary to consider whether or how far my disagreement with the reasoning of the acting Attorney General in the opinion above referred to would involve disagreement with the conclusions reached by him on the precise questions on which his opinion was requested.

5. Finally, the additional question is asked, whether allowances under section 4757 are pensions within the meaning of section 4813 and the act of June 30, 1914.

It seems that following a decision of the Comptroller of the Treasury of May 12, 1913 (19 Comp. 723), which is based expressly upon language contained in the opinion of the Acting Attorney General of December 23, 1903 (25 Op. 85) *supra*, allowances under section 4757 have been treated by the Interior Department as outside the purview of section 4813, and are therefore paid by the Commissioner of Pensions directly to the beneficiaries notwithstanding they are inmates of the Naval Home. This view, in so far at least as embodied in departmental practice, apparently dates from the decision of the Comptroller of

the Treasury (1913) rather than the antecedent opinion of the Acting Attorney General (1903), and is therefore of comparatively recent origin. I am unable to concur in it; the correct construction of the law as it stood prior to the act of June 30, 1914, is, in my opinion, stated in paragraph 3793 of the publication of the Navy Department, entitled "Manual for the Medical Department of the United States Navy," quoted in the memorandum of the Judge Advocate General of the Navy of December 4, 1917, accompanying the letter of that date from the Secretary of the Navy, as follows:

"All pensions received under the general pension laws or under section 4756 or 4757 of the Revised Statutes must be surrendered by pensioners upon their admission into the Naval Home. The pensions of all pensioners during the time that they remain in the home are credited to the Navy pension fund. The pension agent on whose books the names of such pensioners are borne withholds payments from the date of notification by the governor of the Naval Home of the names of the pensioners who have been admitted as inmates of that institution." (*Italics mine.*)

There is nothing in the provisions of section 4757 which to my mind distinguishes the allowances under it from those provided for in section 4756, so far as the applicability of section 4813 is concerned. The sums awarded under either section are paid from the same fund and have the same intrinsic character of gratuities, and there appears to be as much reason for holding allowances under section 4757 to be within the scope of section 4813 as for holding the money benefit or "pension" provided for in section 4756 to be within section 4813. True, the money benefit provided for in section 4756 is expressly referred to in that section as a "pension," while the aid provided for in the succeeding section (4757) is called an "allowance." This change in phraseology, however, as was pointed out by the Assistant Secretary of the Interior in the case of *John Spencer*, 7 P. D. 152, 153, *supra*, does not alter the essential nature of the sums granted under the respective sections. The money benefit provided for in section 4756 Revised Statutes was by express terms "in lieu of being provided with a home in the Naval Asylum, Philadelphia,"

and was for years held by your two Departments to be a "pension" forfeited by inmates of the home pursuant to section 4813. There is, in my opinion, nothing to indicate an intention on the part of Congress to accord more liberal treatment under section 4757 to 10-year service men than was given by section 4756 to those who had served 20 years. I conclude, therefore, that allowances granted under section 4757 were within the purview of section 4813, Revised Statutes, and hence that they are also within the act of June 30, 1914, which supersedes that section so far as disposition of the pensions of inmates of the Naval Home is concerned.

To recapitulate: It is my opinion, based upon the respective reasons hereinbefore stated—

1. That the money benefits provided for in section 4756 are within the purview of the word "pension" in section 4813; that they are also within the purview of the word "pensions" in the pertinent provision of the naval appropriation act of June 30, 1914 (38 Stat. 392, 398), and in view of that act inure to the grantees concurrently with maintenance in the Naval Home;

2. That allowances under sections 4756 and 4757 do not fall within the prohibition of section 4715 and may therefore be paid in addition to a pension under general pension laws;

3. That allowances under section 4757 are "pensions" within the meaning of section 4813, Revised Statutes, and the act of June 30, 1914, above referred to, and should therefore be disposed of, in cases where the beneficiaries are inmates of the Naval Home, in the manner prescribed by that act.

Whether, or to what extent, sections 4756 and 4757 have been affected by the provisions of the War Risk Insurance Act, approved October 6, 1917 (40 Stat. 398), is a question not presented, and which has not been considered in this opinion.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE SECRETARY OF THE NAVY.

TO THE SECRETARY OF THE INTERIOR.

CESSION OF STATE JURISDICTION—GEORGIA.

The reservation by the State of Georgia of its civil and criminal jurisdiction over persons and citizens in territory ceded to the United States for Federal building sites fails to meet the requirements of section 355 of the Revised Statutes.

DEPARTMENT OF JUSTICE,

April 22, 1918.

SIR: I have the honor to reply to your letter of March 7, 1918, calling attention to sections 25 and 26 of the Code of Georgia, 1911, volume 1, reading as follows:

"SEC. 25. The consent of the State of Georgia is hereby given, in accordance with the sixteenth clause, eighth section of the first article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any lands in this State heretofore ceded, or that may hereafter be required for sites for customhouses, courthouses, post offices or for the erection of forts, magazines, arsenals, dock yards and other needful buildings." (Acts of 1906, p. 126, Aug. 18, 1906.)

"SEC. 26. Exclusive jurisdiction in and over any lands so acquired by the United States shall be, and the same is hereby ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than said United States shall own such lands. The State retains its civil and criminal jurisdiction over persons and citizens in said ceded territory, as over other persons and citizens in this State. Nothing herein shall interfere with the jurisdiction of the United States over any matter or subjects set out in the acts of Congress donating money for the erection of public buildings for the transaction of its business in this State, or with any laws, rules, or regulations that Congress may hereafter adopt for the preservation and protection of its property and rights in said ceded territory, and the proper maintenance of good order therein: *Provided*, Such cession shall not take effect until the United States shall have acquired title to said lands." (Acts 1890-91, p. 201.)

For reasons stated in my reply to your letter in regard to similar legislation of the State of Kansas, I confine my

opinion to the question whether, having regard to the language of section 355, Revised Statutes, public money under your control may be expended for Federal buildings on sites acquired for that purpose in Georgia. Section 355 reads in part as follows:

"No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy yard, customhouse, lighthouse, or other public building, of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be to such purchase has been given.

It has been settled that the "consent" required by section 355 is that contemplated and spoken of in article 1, section 8, paragraph 17 of the Constitution (24 Op. 619); that it must be free from qualifications, conditions or reservations inconsistent with the exercise by the Congress of "exclusive legislation," over the place ceded.

Section 25 (*supra*) is taken from the Georgia act of August 18, 1906. (Acts 1906, p. 126.) As enacted, that statute contains no unacceptable condition. The codifiers, however, have carried into the compilation of 1911 portions of an act of 1890-91, Georgia Laws, page 201, as section 26 (*supra*), which contains the following provision:

"The State retains its civil and criminal jurisdiction over persons and citizens in said ceded territory, as over other persons and citizens in this State."

This declaration must have been intended as a qualification of the consent given and as a limitation upon the jurisdiction ceded. Transfer of exclusive legislative authority to the United States, which ordinarily is the legal consequence of "purchase with consent," is not accomplished when that consequence is expressly denied by the State. I am therefore of opinion that the act fails to meet the requirements of section 355, Revised Statutes.

I concur in the suggestion of the Solicitor of the Treasury that efforts be made to procure an enactment giving consent to acquisitions of lands for Federal purposes,

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wholly free from conditions or reservations which hereafter may be the occasion of doubt or question.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

ENTRY FOR CONSUMPTION AND WAREHOUSE OF
MERCHANDISE.

William A. Brown & Co., or its duly authorized agent, is entitled to make entry for consumption and warehouse of certain imported merchandise, which has remained unclaimed in general-order warehouse for more than one year but has not been sold by the collector, and after payment of all charges and duties found to be due, will then become entitled to all the rights and privileges accorded importers in regard to the exportation of merchandise, with a right of drawback, as provided by article 836, *et seq.*, of the Customs Regulations of 1915.

DEPARTMENT OF JUSTICE,
May 6, 1918.

SIR: I have the honor to reply to your request, under date of April 20, 1918, for an expression of my opinion upon the question of the right of William A. Brown & Co. to make entry for warehouse and subsequent exportation, free of duty, or, in the alternative, to make entry for consumption and exportation with the right of drawback, under article 836, Customs Regulations of 1915, of certain merchandise imported at New York on July 27, 1916, which has remained unclaimed in general-order warehouse for more than one year but has not been sold by the collector.

From the papers accompanying your letter, it appears that it is conceded that this merchandise could be entered for consumption or warehouse upon payment of duties and accrued charges (art. 810, Customs Regulations, 1915; sec. 2973, Revised Statutes; opinion of Attorney General of Jan. 17, 1895, 21 Op. 116). Entry for warehouse and exportation with the benefit of the drawback provided by articles 836-839 of the Customs Regulations of 1915 was, however, refused upon the ground that the last paragraph

of article 805 of the Customs Regulations of 1915 stands in the way. This paragraph reads:

"No merchandise remaining unclaimed more than one year shall be exported without payment of duty."

From the opinion of the Attorney General and the language of article 810 of the Customs Regulations of 1915, the first paragraph of which reads as follows—

"Merchandise not claimed within one year may at any time previous to sale be entered for consumption or warehouse, and withdrawn upon payment of duty and expenses"—it seems clear that the importer, or owner, of merchandise does not lose title to the goods by allowing them to remain unclaimed for more than a year. His rights may be foreclosed by a sale, but otherwise the seasonable payment of duties and charges removes any limitation upon those rights which has resulted from his permitting the goods to pass to the general-order warehouse as unclaimed property, unless the language of article 805 (Customs Regulations, 1915) imposes a limitation which can not be so removed. One of the ordinary rights of importers is to enter for consumption or warehouse for exportation "directly from the uninterrupted custody of officers of the customs," and upon such exportation to become entitled to a drawback of 99 per cent of the regular duties paid (arts. 836, 837, Customs Regulations, 1915). In the absence of clear and explicit prohibition, it would seem that the present applicant, who is ready to pay the accrued duties and charges, would, on so doing, be entitled to this right of drawback in the same manner as would an importer who had acted within a year after importation.

It is suggested, however, that the language quoted from article 805 of the regulations is such an explicit limitation. The result of this contention would be that this importer, upon payment of proper charges and expenses incurred, would, under article 810, be entitled to enter his merchandise for consumption as could any other importer, and dispose of it as he pleases within the territory of the United States, but not to export it and receive the benefit of drawback. That this is a curious penalty for failure to make entry within a year suggests that such was not in-

tended to be the construction of the language in question. Indeed, such an interpretation would result in inconsistency between articles 805 and 810, it being the apparent intention of 810 to restore to the importer or owner of unclaimed property which has not remained in general orders for three years and has not been sold such property without any penalty other than payment of the charges which have accrued as a result of the necessity for safe-keeping of the goods. A reading of article 805 as a whole does not suggest an intention to impose any penalty, but merely to protect the interest of the United States in its lien for duties, expenses, etc. And while the language of the last clause is somewhat ambiguous, I am of opinion that its true effect is to require goods which have remained in general orders unclaimed for more than a year to be formally entered for warehouse upon the payment of the appropriate duties before exportation. I do not think that once the entry has been made and the duties paid the paragraph in question was intended to deprive the importer of his right to export directly from the uninterrupted custody of officers of customs, and upon so exporting, to claim the drawback of 99 per cent provided by article 836.

I have examined the Treasury Decisions and the articles of the Customs Regulations of 1892, 1899, and 1908, to which you call my attention. It does not seem to me that these affect the present case. The articles from the earlier Customs Regulations referred to show a change in the policy of the Treasury Department with respect to merchandise which has remained in general order warehouse for a period of more than one year. It was originally provided (art. 808 of the Customs Regulations of 1892) that merchandise remaining in general orders for more than one year might be entered "for consumption only." By article 1219 of the Customs Regulations of 1899 it was provided that such merchandise might, "at any time previous to being listed for sale," be entered "for consumption *or* warehouse," and that language was carried over into article 1092 of the Customs Regulations of 1908 and into the provision of article 810 of the Customs Regulations of 1915, which is quoted above. It may be noted that article 810,

last referred to, distinguishes in this respect between merchandise not claimed within one year, which may be entered for consumption or warehouse, and merchandise remaining for more than three years, which may be withdrawn as long as it has not been sold, but only "for consumption." The variations between the language of article 808 of the Customs Regulations of 1892, which preceded the Attorney General's opinion of January 17, 1895, and that of article 1219 of the Customs Regulations of 1899, which followed that opinion and is the present regulation, indicate that the view expressed above as to the effect of article 810 of the Customs Regulations of 1915 is, in fact, the settled policy of the Department. The Treasury Decisions to which you refer reflect the regulations as they have developed.

I concur in the opinion of the Solicitor of the Treasury that William A. Brown & Co., or its duly authorized agent, is entitled to make entry for consumption and warehouse, and after payment of all charges and duties found to be due, will then become entitled to all the rights and privileges accorded importers in regard to the exportation of merchandise, with a right of drawback as provided by article 836, *et seq.*

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

ESTATE TAX ON REAL ESTATE OUTSIDE UNITED STATES.

Real estate *as such* located outside of the United States, belonging to a decedent resident within the United States, should not be included in determining the value of the gross estate of such decedent for the purposes of the tax imposed by Title II of the revenue act of September 8, 1916 (39 Stat. 777).

DEPARTMENT OF JUSTICE,

May 14, 1918.

SIR: I have the honor to acknowledge your letter of the 6th instant requesting my opinion on a question arising in the enforcement by the Treasury Department of Title II of

the revenue act of September 8, 1916. The specific question stated by you is as follows:

"Whether real estate located outside of the United States, belonging to a decedent resident within the United States, should be included in determining the value of the gross estate of such decedent for the purposes of the tax imposed by said Title II of the revenue act of September 8, 1916."

1. Title II of the act (39 Stat. 777) is headed "Estate tax." Its general provision, in so far as material, is as follows:

*"That a tax * * * equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States."*

Section 203 referred to above provides for determining the value of the "net estate" by deducting certain items from the "gross estate," and it is therefore necessary to turn back to section 202, where the value of the "gross estate" is determined. That section, in so far as material, provides as follows:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

*"(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death * * *.*

*"(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent or any other person * * *.*

"For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent *shall be deemed property within the United States*, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (b) of this section, *shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.*"

Section 205 provides for a return of the value of the "gross estate" of the decedent, and section 207 for the payment of the estate tax on the "net estate," by the "executor," which term is defined by section 200 as meaning:

"The executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent."

The "executor" as thus defined is required by section 205 to file a return setting forth:

"The value of the gross estate of the decedent at the time of his death."

If he is unable to make a complete return as to any part of the gross estate—

"he shall include in his return a description of such part and the name of every person holding a legal or beneficial interest therein, and upon notice from the collector such person shall in like manner make a return as to such part of the gross estate."

Section 207 (read in connection with sec. 200) provides that the "executor" shall pay the tax to the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death.

If the tax be not paid at the time fixed, the unpaid amount "shall be a lien upon the entire gross estate" (except what has been sold to bona fide purchasers), and section 208 provides that proceedings may be commenced—"in any court of the United States * * * to subject the property of the decedent to be sold under the judgment or decree of the court."

If the tax be paid by a person not strictly an executor or administrator, he is entitled to equitable exoneration or subrogation, section 208 stating that it is—

“the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.”

Section 209 provides, in so far as material, that, if the tax be not paid sooner, the lien upon “the gross estate of the decedent” shall remain for 10 years.

This section further provides that if a transfer has been made in contemplation of death, etc., the trustee or transferee shall be personally liable for the tax and the property involved shall, to the extent of the decedent's interest therein at the time of transfer, be subject to a lien for the tax “in respect thereto.”

It should be mentioned in addition to the above that section 203, which fixes the deductions allowable from “gross estate” in order to determine “net estate,” includes as a legitimate allowance—

“such other charges against the estate, as are allowed by the laws of the jurisdiction; whether within or without the United States, under which the estate is being administered.”

2. The tax levied by these provisions differs in its character from the legacy taxes levied by the Federal Government during the Civil and Spanish Wars, and from the general run of State inheritance tax laws; although it is in some respects similar to the act of New York construed in *Matter of Estate of Swift*, 137 N. Y. 77. It seems to have been modeled as to its main intent and incidence on the English finance act of 1894 (57 and 58 Vict. ch. 30, Pt. I), though differing in material respects from that act.

3. The tax is laid upon the “transfer” of the “estate” of “every decedent” dying after its passage. These are clearly words of great scope, but it may be said of them what the Privy Council of England said as to a somewhat similar Australian act (*Blackwood v. The Queen*, 8 App. Cas. 82, 94):

"Their Lordships conceive that one of the safest guides to the construction of sweeping general words, which it is difficult to apply in their full literal sense, is to examine other words of like import in the same instrument, and to see what limitations must be imposed on them. If it is found that a number of such expressions have to be subjected to limitations or qualifications, and that such limitations and qualifications are of the same nature, that forms a strong argument for subjecting the expression in dispute to a like limitation or qualification."

This is but to apply to a special case the general rule that a statute must be read and construed as a whole, as a part of a working system of law.

The generality of language in section 201 is clearly, for the purposes of the question propounded by you, limited by the subdivisions of section 202. While that section begins by including in the value of the gross estate of the decedent—

"all property, tangible or intangible, wherever situated" it immediately explains that this is only to the extent of the "interest" subject to the payment of the charges against the estate of the decedent and expenses of its administration, and subject to distribution as a part of it. Without in any way committing myself to an opinion as to the proper scope of these words, I do not think it can be denied that they are not exactly the words which Congress would have used had it intended to include foreign real estate. Subdivisions (b) and (c) are, in their main provisions, broad enough to cover foreign real estate, but the last paragraph of the section explicitly provides that—"for the purpose of this title * * * any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (b) of this section, *shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.*"

Clearly these words are meaningless if Congress intended by its previous provisions to tax real estate whether situated in the United States or not. This being so, there

is equally little reason to suppose that Congress intended to tax real estate situated outside of the United States passing by testate or intestate transfer, instead of by transfer in contemplation of death.

Paragraph (1) of subdivision (a) of section 203 permits as a deduction from the gross estate charges against the estate allowed by the laws of the jurisdiction under which the estate is being administered, whether such jurisdiction is national or foreign. Here the intent is clear to levy a tax upon an estate which may for some reason be subject to a foreign jurisdiction; but, as was said above in regard to subdivision (a) of section 202, the language is not that which would naturally have been used if foreign *real estate* was meant to be included, and may be fairly satisfied by an application to foreign *personalty*.

The sections in regard to the filing of a return (205) and to the payment of the tax (207, 209) are applicable to foreign real estate, to the extent of applying the rule of effectiveness (Dicey Conflict of Laws, 2d ed., p. 40, General Principle No. III; *Blackstone v. Miller*, 188 U. S. 189). That is to say, the above sections impose a personal duty on the "executor," transferee, or trustee within the jurisdiction to pay the tax upon certain property, which duty, so far as the language of the sections in question goes, is broad enough to extend to foreign real estate.

On the other hand, by the same sections a lien is created on the estate for the unpaid taxes, and by section 208 a suit to subject the property of the decedent to the payment of the taxes is authorized in the United States courts, neither of which provisions can, of course, apply to foreign real estate.

4. It is doubtful how far conceptions derived from previous legislation should be permitted to affect the construction of a statute based, as this is, on principles which have not yet been thoroughly tried out and upon which consequently I have no decisions of the Supreme Court of the United States to guide me. It may, however, be assumed that there is, not merely a technical, but a real distinction between personal and real property in so far as the present subject is concerned. The well established rule is that

not merely the *form* of transfer of real property on death but also the *substance*, e. g., who shall take, to what extent, and under what conditions, is governed by the *lex rei sitae*. (Story Conflict of Laws, §§ 424, 591; Dicey Conflict of Laws, 2d ed., p. 391, rule 89, p. 500, rule 141; *United States v. Crosby*, 7 Cranch. 115; *McCormick v. Sullivan*, 10 Wheat. 192, 202; *United States v. Fox*, 94 U. S. 315, 320; *Robertson v. Pickrell*, 109 U. S. 608; *Hanson Death Duties*, 6th ed., p. 2.) On the other hand, as to personal property, the rule of *mobilia sequuntur personam* has had the effect to draw even tangible personal property to the jurisdiction of the domicile (*Ennis v. Smith*, 14 How. 400, 424; *Carpenter v. Pennsylvania*, 17 How. 456, 462, 463; *Eidman v. Martinez*, 184 U. S. 578, 581; *Bullen v. Wisconsin*, 240 U. S. 625, 631; *Fidelity and Columbia Trust Co. v. Louisville*, 245 U. S. 54, 59; In the matter of *Swift*, *supra*; In re Dowager Duchess of Manchester (1912) 1 Ch. 540); although at the same time such property may also be subjected to an inheritance tax at its *situs*. (Cf. *Winans v. Attorney General* (1910) A. C. 27, and *Wheeler v. N. Y.*, 233 U. S. 434, with *Eidman v. Martinez*, *supra*.)

The plain sense of the matter is that real estate in a foreign country, unlike personal estate there, can not be enjoyed *as such* in any true sense without the protection and supervision of the laws of the foreign jurisdiction in which it is situated, while as to personal property the fact may very well, for obvious reasons, be different. Hence all Governments agree to recognize the domicile of the decedent as the *situs* of primary administration upon his personal estate, while none recognizes this domicile as to his realty.

I must assume that Congress had in mind these well-established principles in enacting the statute now in question. As I have pointed out above, while there are provisions in it which, taken in their generality, apply to foreign real estate, there are others which are not compatible with such an extended incidence, and which indicate a purpose to apply the settled rule of *situs* to such property. I have therefore reached the conclusion that real estate *as such* located outside of the United States, belonging to a

decedent resident within the United States, should not be included in determining the value of the gross estate of such decedent for the purposes of the tax imposed by Title II of the revenue act of September 8, 1916.

This conclusion is supported by the authorities cited in the margin, and I have found none in any way contrary to it.¹

I have not considered, and therefore express no opinion upon, any question of equitable conversion of realty into personalty, or of trusts to convert real estate and distribute the proceeds in this country or the like.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

CESSION OF STATE JURISDICTION—NEVADA.

The reservation by the State of Nevada of the right to administer its criminal laws upon the lands acquired by the United States for Federal building sites is incompatible with the consent required by section 355 of the Revised Statutes.

DEPARTMENT OF JUSTICE,
May 28, 1918.

SIR: I have the honor to reply to your letter of April 13, 1918, supplementing your letters of April 6 and March 29, 1918, and requesting my opinion whether sections 1951 and 1952, Revised Laws of Nevada, 1912, meet the requirements of existing Federal law relating to jurisdiction over sites for public buildings under your control.

My attention is not directed to any appropriations by Congress limiting or defining, with respect to particular projects, the extent of cession of jurisdiction required. Cf. 20 Op. 613. I, therefore, assume that the building appropriations under your control as to which you desire an opinion are governed by the limitations expressed in

¹ *Commonwealth v. Coleman's Administrator*, 52 Pa. St. 468; *Drayton's Appeal*, 61 Pa. St. 172; *Bittinger's Estate*, 129 Pa. St. 338; *Hale's Estate*, 161 Pa. St. 181; *Connell v. Crosby*, 210 Ill. 380; *People v. Kellogg*, 268 Ill. 489; *Attorney General v. Barney*, 211 Mass. 134; *Dana v. Treasurer*, 227 Mass. 562; *Matter of Estate of Swift*, 137 N. Y. 77; *Keeney v. N. Y.*, 222 U. S. 525, 537; *Attorney General v. Johnson* (1907), 2 K. B. 885, 893.

section 355, Revised Statutes, reading in part as follows:

"No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy-yard, customhouse, light-house, or other public building, of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given * * *."

It has been settled that the "consent" required by section 355 must be free from conditions or reservations inconsistent with the exercise by the Congress of "exclusive legislation" (as provided in art. 1, sec. 8, par. 17 of the Constitution) over places purchased.

The applicable Nevada law reads as follows:

"SEC. 1951. The jurisdiction of this State is hereby ceded to the United States of America over all pieces or parcels of land within the limits of this State that may be selected or acquired by the United States for the purpose of erecting thereon a public building or public buildings for the accommodation of the United States courts, the post office and other Government offices; and the United States shall have exclusive jurisdiction over the same during the time said United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of this State, and the service of any civil process therein or thereon.

"SEC. 1952. The lands aforesaid, when so acquired, shall forever be exempt from all taxes and assessments so long as the same shall remain the property of the United States."

The statute does not, formally, express the consent of the legislature to purchases by the United States. However, it has been held that cession of *exclusive jurisdiction* is the equivalent of "consent" and, if not coupled with objectionable limitations, meets the requirements of section 355. 13 Op. 461; *U. S. v. Tucker*, 122 Fed 520; Cf. 7 Op. 629.

The act cedes exclusive jurisdiction "*for all purposes except the administration of the criminal laws*" of the

State * * *. Construing it, the Supreme Court of Nevada has held that, notwithstanding the exception, the State thereby did not retain the cognizance of crimes committed on a site acquired by the Government for the Federal building at Carson City. *State ex rel., etc., v. Mack*, 23 Nev. 359, 366.

The opinion of the State's highest tribunal is entitled to great respect. Nevertheless, a controversy in a Federal court involving the statute and its effect upon the jurisdiction of that court would not be determined upon the principle that the decision of the State court is controlling. *U. S. v. Tully*, 140 Fed. 899. As I pointed out in a letter addressed to you under date of April 8, 1918, regarding legislation of the State of Illinois, the Nevada decision conflicts with the construction placed by my predecessors upon similar legislation of other States. 20 Op. 611, 613; 24 Op. 617, 619.

In accordance with the conclusion reached in those cases, I am of opinion that the Nevada statute does not meet the requirements of section 355, Revised Statutes, and suggest that, as recommended by the Solicitor of the Treasury, steps be taken to secure the passage of an act of consent by the Legislature of Nevada which shall be free from questionable qualifications or reservations.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE SECRETARY OF THE TREASURY.

WAR-RISK INSURANCE ACT—ACCRUED PENSIONS.

A sergeant in the Marine Corps who, prior to the enactment of the War-Risk Insurance Act of October 6, 1917, had served in the corps for more than 21 years and who had become "disabled from sea service" by a wound received in action in June, 1916, but who, though entitled to honorable discharge from the service upon October 6, 1917, did not actually receive his discharge until November 5, 1917, is entitled both to the benefits of section 4756 of the Revised Statutes and also to whatever allowance he may be otherwise entitled to under the provisions of the War-Risk Insurance Act.

DEPARTMENT OF JUSTICE,

May 28, 1918.

SIR: The opinion of this Department is asked concerning the effect of section 312 of the War-Risk Insurance Act, approved October 6, 1917 (40 Stat. 408), upon the allowance of pensions by the Secretary of the Navy under section 4756, Revised Statutes. The sections above cited are as follows:

Section 312 of the act of October 6, 1917:

"The laws providing for gratuities or payments in the event of death in the service and existing pension laws shall not be applicable after the enactment of this amendment to persons now in or hereafter entering the military or naval service, or to their widows, children, or their dependents, except in so far as rights under any such law shall have heretofore accrued."

Section 4756, Revised Statutes, as amended:

"There shall be paid out of the naval pension-fund to every person who, from age or infirmity, is disabled from sea-service, but who has served as an enlisted person or as an appointed petty officer, or both, in the Navy or Marine Corps for the period of twenty years, and not been discharged for misconduct, in lieu of being provided with a home in the Naval Asylum, Philadelphia, if he so elects, a sum equal to one-half the pay of his rating at the time he was discharged, to be paid to him quarterly under the direction of the Commissioner of Pensions; and applications for such pension shall be made to the Secretary of the Navy, who, upon being satisfied that the applicant comes within the provisions of this section, shall certify the same to the Commissioner of Pensions, and such certificate shall be his warrant for making payment as herein authorized."

The specific case which prompts the present inquiry is that of Fernando L. Birrer, who, on October 6, 1917, had served in the Marine Corps for more than 21 years. He had become "disabled from sea service" by a wound received in action in June, 1916, but had not been discharged from the corps in which he was a first sergeant. He was

discharged November 5, 1917, on the report of a medical survey. His character was declared "excellent." The case is said to be typical of a number of such cases.

Section 4756, Revised Statutes, is under the established practice of the Navy Department to be regarded as one of the "existing pension laws" referred to in section 312 of the act of October 6, 1917. And such was the view expressed by me in my opinion of April 11, 1918. Payments under it are therefore no longer applicable except so far as rights under the law had accrued on October 6, 1917. The question presented, therefore, is whether in cases like that now before me, rights under section 4756, Revised Statutes, had "accrued" to one who, though in every other respect entitled to allowances under that section, had not yet actually received his discharge from the service.

I think they had so accrued, and that the fact that he did not actually receive his discharge until November 5, 1917, is not material. He was entitled to honorable discharge upon October 6, 1917, and thereupon to the benefits provided by section 4756, Revised Statutes. He did not lose this right by a month's further honorable service.

Assuming that the provisions of the War-Risk Insurance Act are to be regarded as constituting a general pension law, the prohibition of section 4715, Revised Statutes, against the allowance of more than one pension at the same time to the same person does not affect this case. See my opinion of April 11, 1918.

I think, therefore, that Birrer is entitled both to the benefits of section 4756, Revised Statutes, and also to whatever allowance he may be otherwise entitled to under the provisions of the War-Risk Insurance Act. Payments under section 4756 would not commence to run until he had actually received his discharge. (Act of Mar. 3, 1891, 26 Stat. 1082.)

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

To the SECRETARY OF THE NAVY.

WAR TAX ON ARTICLES SOLD IN FOREIGN COMMERCE.

The tax levied by section 600, and by the analogous sections, of the War Revenue Act of October 3, 1917 (40 Stat. 316, *et seq.*) upon articles sold by a manufacturer, producer, or importer, does not apply to sales in foreign commerce by a manufacturer, producer, or importer located in one of the several States of the United States.

DEPARTMENT OF JUSTICE,

June 5, 1918.

SIR: I have the honor to acknowledge your letter of April 11th requesting my opinion as to whether the tax imposed by section 600 of the War Revenue Act of October 3, 1917 (40 Stat. 300, 316), and by other sections of that Act upon articles sold by a manufacturer, producer, or importer, applies to sales in foreign commerce by a manufacturer, producer, or importer located in one of the several States of the United States.

You state that, while the subject matter of your inquiry is general, the following portion of section 600 is typical of the entire class of taxes to which you refer:

"That there shall be levied, assessed, collected, and paid—

(a) Upon all automobiles, automobile trucks, automobile wagons, and motorcycles sold by the manufacturer, producer, or importer, a tax equivalent to three per centum of the price for which so sold."

You further state, as to the method of business in the articles covered by section 600, that—

"Automobiles or other articles may normally be sold in foreign commerce in several ways. (1) Articles may be shipped by the manufacturer to an agent in a foreign country and after reaching there may be sold by the agent. (2) Articles may be shipped by the manufacturer to a foreign purchaser to fill orders accepted by an agent in a foreign country. (3) Articles may be shipped by the manufacturer to a foreign purchaser to fill orders received by the manufacturer in the United States. (4) Articles may be shipped by the manufacturer to a foreign purchaser to fill orders solicited by mail and received by mail from a foreign purchaser."

300 *War Tax on Articles Sold in Foreign Commerce.*

You then state the precise question submitted to me, as follows:

"Whether the tax imposed by section 600 of the act of October 3, 1917, applies to the articles specified therein when sold in foreign commerce by any of the methods above outlined by a manufacturer, producer, or importer located in a State of the United States."

In my judgment it does not.

In my opinion to you of March 12 last (31 Op. 239) I held that section 500 of the act of October 3, 1917, levying a tax upon the transportation of property from one point in the United States to another should not be held applicable to property in the course of transportation to foreign countries, because such a construction would cause grave doubt as to the validity of that portion of the act, in view of the constitutional prohibition against a tax upon articles exported from any State.

Since that opinion was rendered the Supreme Court, in the case of *Peck v. Lowe*, decided May 20 last, has announced at length the principles governing this subject, so as to leave nothing except their intelligent application.

In the case referred to the court, having before it the unlimited power of Congress to lay taxes on the one hand and the constitutional prohibition that no tax shall be laid on articles exported from any State on the other, stated that the amendment prohibiting a tax on articles exported—

"Excepts from the range of that power articles in course of exportation, * * * the act or occupation of exporting * * *, bills of lading for articles being exported * * *, charter parties for the carriage of cargoes from State to foreign ports * * *, and policies of marine insurance on articles being exported * * *. In short, the court has interpreted the clause as meaning that exportation must be free from taxation, and therefore, as requiring 'not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation.'"

The court then announced as a general principle governing the validity of a tax claimed to be on articles exported that—

"The true test of its validity is whether it 'so directly and closely' bears on the 'process of exporting' as to be in substance a tax on the exportation."

Finally, in deciding that a tax on the net income of an exporter was not a tax on the articles exported by him, the court, explaining the extent to which it was prepared to go, stated that such a tax upon the net income of the individual engaged in the business of exporting was not a tax—

"on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes."

The inference necessarily and justly is that a tax upon anything which inherently or by the usages of commerce is embraced in exportation or any of its processes is a tax upon "articles exported" within the meaning of the Constitution.

The tax levied by section 600 of the act of October 3, 1917, and by the analogous sections is clearly one on sales, and it is measured by the price for which the article is sold. If, therefore, this tax be held to apply to sales in foreign commerce, its incidence will be directly upon a process inherently embraced in exportation to as full an extent as a tax on freights, on the charter party, or on the policy of insurance.

The subject matter of your question is therefore governed by my opinion to you of March 12 last, confirmed by the principles stated by the Supreme Court in *Peck v. Lowe*, (247 U. S. 165, 173, 174).

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

INCOME TAX—INVENTORIES BY DEALERS IN MERCHANDISE AND IN SECURITIES.

An inventory taken by a manufacturer of or dealer in merchandise at cost or market value, whichever is lower, is permitted by subdivision (g) of section 8 and by subdivision (d) of section 13 of the Income Tax Act of September 8, 1916 (39 Stat. 763, 770), subject, of course, to regulations made in accordance with said act.

The same rule applies to a dealer or merchant in securities; and it is a matter for regulations issued by the Treasury Department under the authority of the aforesaid act to determine what constitutes a dealer or merchant in securities.

DEPARTMENT OF JUSTICE,

June 26, 1918.

SIR: I have the honor to refer further to your letter of December 21 last, in which you requested my opinion on the following questions arising in the administration of your Department in connection with the interpretation of the Income Tax Act of September 8, 1916, 39 Stat. 756, and Title II, war excess profits tax, of the revenue act of October 3, 1917 (40 Stat. 302):

"1. Can a manufacturer of or dealer in merchandise making an inventory at the end of the year for the purpose of ascertaining his profits during the year be permitted under the rules and regulations prescribed by the Commissioner of Internal Revenue, with my approval, to take such inventory at cost or market value, whichever is lower, under the provisions of sections 8 (*g*) and 13 (*d*) of the act of September 8, 1916, as amended, or any other provision of the income tax law?

"2. If the foregoing question be answered in the affirmative, can the same rule be applied to a dealer or merchant in securities? Such dealer or merchant being defined as follows:

"A dealer in securities means a merchant of securities, whether an individual, partnership or corporation, with an established place of business, whose principal business is the purchase of securities and their resale to customers. Taxpayers who buy and sell for investment or speculation, and (in their individual capacity) officers of corporations or members of partnership which deal in securities, are not dealers. Banks and trust companies with distinctly separate departments which, standing alone would be dealers or merchants as above defined, may inventory securities, held as stock in trade of such branches or departments, according to the method prescribed in Treasury Decision 2609."

Section 8 of the act of September 8, 1916, subdivision (g), (39 Stat. 763), provided as follows:

"An individual keeping accounts upon any basis other than that of actual receipts and disbursements, unless such other basis does not clearly reflect his income, may, subject to regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, make his return upon the basis upon which his accounts are kept, in which case the tax shall be computed upon his income as so returned."

A precisely similar provision was made as to corporations, etc., by subdivision (d) of section 13 (39 Stat. 771).

In *Doyle v. Mitchell Brothers Company*, (247 U. S. 179), decided by the Supreme Court on May 20 last, the general meaning of the term "income" as used in the income-tax acts was defined, and it was held, affirming the opinion of the Court of Appeals for the Sixth Circuit in *Doyle, Collector, v. Mitchell Brothers Company*, 235 Fed. 686, as follows:

"In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration."

Applying this rule to the case before the court, it was stated that the Mitchell Bros. Co. deducted from its gross receipts the inventory valuation as of December 31, 1908, of the stumpage cut and converted during the year covered by the tax, and that—

"This was in accordance with the true intent and meaning of the act."

It follows necessarily from this opinion that an inventory taken by a manufacturer of or dealer in merchandise at cost or market value, whichever is lower, is permitted by subdivision (g) of section 8 of the act of September 8, 1916, and by subdivision (d) of section 13, since it can not be said that this method of computation is upon a basis which does not clearly reflect income, subject, of course, to regulations made in accordance with the act.

I therefore answer your first question in the affirmative.

As no valid distinction can be suggested between a dealer in merchandise and a dealer or merchant in securities, I answer your second question likewise in the affirmative. What constitutes a dealer or merchant in securities is a matter for regulations issued by yourself under the authority of the act.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

INCOME TAX—PROCEEDS OF ACCIDENT INSURANCE
POLICY.

The proceeds of an accident insurance policy received by an individual on account of personal injuries sustained by him through accident are not income taxable under the provisions of Title I of the act of September 8, 1916 (39 Stat. 757), as amended by Title XII of the act of October 3, 1917 (40 Stat. 329), and of Title I of the act of October 3, 1917 (40 Stat. 300).

DEPARTMENT OF JUSTICE,

June 26, 1918.

SIR: I have the honor to acknowledge your letter of April 11, requesting my opinion as to whether the proceeds of an accident insurance policy received by an individual on account of personal injuries sustained by him through accident are income taxable under the provisions of Title I of the act of September 8, 1916 (39 Stat. 757), as amended by Title XII of the act of October 3, 1917 (40 Stat. 329), and of Title I of the act of October 3, 1917 (40 Stat. 300).

1. The income of individuals subject to taxation under Title I of the act of September 8, 1916, as amended by Title XII of the act of October 3, 1917, is defined by subdivision (a) of section 2 of said act of September 8, 1916, as amended by section 1200 of said act of October 3, 1917, which provides:

“That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or

from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

The exemptions referred to in this subdivision are covered by section 4 of the act of September 8, 1916, as amended by section 1200 of the act of October 3, 1917. None of said exemptions, in my judgment, is material to your question except that of the proceeds of life insurance policies paid to individual beneficiaries upon the death of the insured.

The deductions referred to in subdivision (a) *supra* are set forth in section 5 of said act of September 8, 1916, as amended by section 1201 of the act of October 3, 1917. None of said deductions is, in my judgment, material to the question submitted by you except that portion of paragraph 4 which reads as follows:

"Fourth. Losses actually sustained during the year, incurred in his business or trade, or arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise:"

2. It is evident that if the proceeds of an accident insurance policy are to be brought within the provisions of the act of September 8, 1916, as amended, it must be under the general words of subdivision (a) of section 2, *supra*: "gains or profits and income derived from any source whatever."

In *Doyle v. Mitchell Brothers Company*, (247 U. S. 179), decided by the Supreme Court May 20 last, the question of the correct meaning of "income" as used in the corporation excise tax act of August 5, 1909, was carefully considered. It was stated:

"Whatever difficulty there may be about a precise and scientific definition of 'income', it imports, as used here, something entirely distinct from principal or capital

either as a subject of taxation or as a measure of the tax; conveying rather the idea of gain or increase arising from corporate activities. As was said in *Stratton's Independence v. Howbert*, 231 U. S. 399, 415; 'Income may be defined as the gain derived from capital, from labor, or from both combined.'

"Understanding the term in this natural and obvious sense, it can not be said that a conversion of capital assets invariably produces income. If sold at less than cost, it produces rather loss or outgo. Nevertheless, in many if not in most cases there results a gain that may properly be accounted as a part of the 'gross income' received 'from all sources', and by applying to this the authorized deductions we arrive at 'net income'. In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration."

It is true that this decision deals with income earned from the business activities of corporations, and not in terms with the unearned income of individuals from investments. The principles laid down, however, seem general in their application. Moreover, the corporation tax act provided as a basis of the levy merely "gross income from all sources," whereas the corresponding general basis in the act of September 8, 1916, is "gains or profits and income derived from any source whatever"—language more apt for the exclusion of "capital" receipts than the other.

In *Lynch v. Hornby*, (247 U. S. 339), decided by the Supreme Court on June 3, 1918, the question whether "income" of an individual included all dividends received by him was involved. It was held that the income-tax act included dividends received in the ordinary course by a stockholder from a corporation, even though they were extraordinary in amount and might appear upon analysis to be a mere realization in possession of an inchoate and contingent interest that the stockholder had in a surplus of corporate assets previously existing, for the reason that:

"Dividends are the appropriate fruit of stock ownership, are commonly reckoned as income, and are expended as such by the stockholder without regard to whether they are declared from the most recent earnings, or from a surplus accumulated from the earnings of the past, or are based upon the increased value of the property of the corporation."

The court held, however, in *Lynch v. Turrish*, (247 U. S. 221), that a final dividend paid from the proceeds of sale of the entire capital assets of a corporation, and, in *Southern Pacific Company v. Lowe*, (247 U. S. 330), that a dividend which was a mere readjustment of a capital indebtedness, were not within the act.

Are the proceeds of an accident insurance policy "gains or profits and income" according to the principles thus laid down by the Supreme Court? The proceeds of life insurance policies are expressly exempted from the act by section 4, nor does the fact that the section refers to them as "income" seem significant. "The value of property acquired by gift, bequests, devise, or descent" is treated in the same way, and yet the "income" from such property is included. This seems to imply that the property itself is capital. As to fire, marine, and casualty insurance, paragraph (a) of section five impliedly prohibits the deduction of losses when compensated for by such insurance. Upon this point the Court of Appeals for the Sixth Circuit in *Doyle v. Mitchell Brothers Company* (235 Fed. 686, 688), in illustrating the principles subsequently declared to be sound by the Supreme Court in the same case, said:

" * * * If an illustration were needed to show that money received from selling capital assets cannot be 'income', it would be found in the statutory treatment of insurance money. A loss suffered during the year may be deducted from income, but not so if the loss was compensated by insurance. Fire insurance money is clearly a substitute for the assets burned; but we find that in case of a fire loss uninsured the loss may be deducted from income, while if it is insured, and if the insurance money is 'income', the loss may not be deducted, and the insurance money must be added—an absurdity which can be avoided

only by saying that such insurance money is not income at all. The proceeds of the sale of a building or other permanent assets are as clearly a substitute therefor as is the insurance money paid to indemnify for a building burned."

Assuming that this dictum is a correct construction of the act, and is not directly applicable to accident insurance as included in casualty insurance, it follows that if the proceeds of such accident insurance are held to be "income", they are in a category different from the proceeds of any other kind of insurance.

In my opinion the act does not make such a distinction, because the proceeds of an accident insurance policy are not "gains or profits and income" as these terms are defined by the Supreme Court. Without affirming that the human body is in a technical sense the "capital" invested in an accident policy, in a broad, natural sense the proceeds of the policy do but substitute, so far as they go, capital which is the source of *future* periodical income. They merely take the place of capital in human ability which was destroyed by the accident. They are therefore "capital" as distinguished from "income" receipts.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE TREASURY.

**TAXATION—PENNSYLVANIA WORKMEN'S COMPENSATION
FUND AND INSURANCE POLICIES THEREUNDER.**

The Pennsylvania workmen's compensation fund, which is established to insure employers against the liability imposed by the State workmen's compensation act, is exempt from taxation under section 11, paragraph (b) of the Income Tax Act of September 8, 1916 (39 Stat. 767).

Policies of insurance issued by the State of Pennsylvania under the provisions of the State workmen's compensation act are not subject to the special tax imposed upon policies of insurance by section 504, paragraph (c) of the war revenue act of October 3, 1917 (40 Stat. 316).

DEPARTMENT OF JUSTICE,

July 19, 1918.

SIR: I have the honor to acknowledge your letter of May 31, requesting my opinion as to whether the Pennsylvania

workmen's compensation fund, which is established to insure employers against the liability imposed by the State workmen's compensation act, is subject to the provisions of the income tax act of September 8, 1916, as amended by the act of October 3, 1917.

You also inquire whether the policies of insurance issued by the State of Pennsylvania under the provisions of the State workmen's compensation act are subject to taxation under the provisions of section 504 (c) (40 Stat. 316), which imposes a tax upon policies of insurance.

The act of September 8, 1916 (39 Stat. 756, 765, 767), after levying by section 10 a tax upon the total net income received in the preceding calendar year from all sources by every corporation, provides by section 11 (b) as follows:

"There shall not be taxed under this title any income derived from any public utility or from the exercise of any essential governmental function accruing to any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, * * *. *Provided*, That whenever any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, has, prior to the passage of this title, entered in good faith into a contract with any person or corporation, the object and purpose of which is to acquire, construct, operate, or maintain a public utility, no tax shall be levied under the provisions of this title upon the income derived from the operation of such public utility, so far as the payment thereof will impose a loss or burden upon such State, Territory, or the District of Columbia, or a political subdivision of a State or Territory; * * *."

Section 504 (c) levying a special tax upon policies of insurance contains the following exemptions:

"(d) Policies issued by any person, corporation, partnership, or association, whose income is exempt from taxation under Title I of the Act entitled 'An Act to increase the revenue, and for other purposes,' approved September 8, 1916, shall be exempt from the taxes imposed by this section."

It follows that the policies issued by the State of Pennsylvania are exempt from the special tax if the income

derived from the State compensation fund is exempt under the provisions of the income tax law.

1. The Pennsylvania fund in question was established by an act of the Pennsylvania Assembly of June 2, 1915 (P. L. 762). It is not necessary to analyze the particular provisions of this act. The important point in regard to it is that the State provided a compulsory system of insurance for employees, and, as an aid to that insurance, provided for State insurance as an alternative to private insurance. The State compensation fund in question was established for the purpose of providing the State with the money out of which claims arising out of State insurance policies might be paid.

2. The workmen's compensation laws of the several States were thoroughly considered by the Supreme Court in the cases of *New York Central R. R. Co. v. White* (243 U. S. 188), *Hawkins v. Bleakly, Auditor* (243 U. S. 210), and *Mountain Timber Co. v. Washington* (243 U. S. 219). In these cases the laws of New York, Iowa, and Washington relating to this subject were held valid, in so far as the Federal Constitution was concerned. In the New York case the Supreme Court said at page 207:

"* * * This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations. *Sherlock v. Alling*, 93 U. S. 99, 103; *Missouri Pacific Ry Co. v. Castle*, 224 U. S. 541, 545."

The Washington case is particularly significant because the law in question there provided only for State insurance and a State fund. Having this condition before it, the Supreme Court said, pages 243 and 244:

"We are clearly of the opinion that a State, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability with consequent loss of earning power among the men and women employed, and, occasionally, loss of life of those who have wives and children or other relations dependent upon them for support, and may require that these human losses shall be charged against the industry, either directly, as is done in the case of the act sustained in *New York Central R. R. Co. v. White*, *supra*, or by publicly administering the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes. The act can not be deemed oppressive to any class of occupation, provided the scale of compensation is reasonable, unless the loss of human life and limb is found in experience to be so great that if charged to the industry it leaves no sufficient margin for reasonable profits. But certainly, if any industry involves so great a human wastage as to leave no fair profit beyond it, the State is at liberty, in the interest of the safety and welfare of its people, to prohibit such an industry altogether."

The reasons which the Supreme Court had in mind as properly inducing the legislatures of the several States in question to pass acts of this character are stated in Mr. Justice Brandeis's dissenting opinion in *New York Central R. R. Co. v. Winfield* (244 U. S. 147, 165):

"* * * It was seen that no system of indemnity dependent upon fault on the employers' part could meet the situation; even if the law were perfected and its administration made exemplary. For in probably a majority of cases of injury there was no assignable fault; and in many more it must be impossible of proof. It was urged: Attention should be directed, not to the employer's fault, but to the employee's misfortune. Compensation should be general, not sporadic; certain, not conjectural; speedy, not delayed; definite as to amount and time of payment;

and so distributed over long periods as to insure actual protection against loss or lessened earning capacity. To a system making such provision, and not to wasteful litigation, dependent for success upon the coincidence of fault and the ability to prove it, society, as well as the individual employee and his dependents, must look for adequate protection. Society needs such a protection as much as the individual; because ultimately society must bear the burden, financial and otherwise, of the heavy losses which accidents entail. And since accidents are a natural, and in part an inevitable, concomitant of industry as now practiced, society, which is served thereby, should in some way provide the protection. To attain this end, cooperative methods must be pursued; some form of insurance—that is, some form of taxation. Such was the contention which has generally prevailed.”

It may be taken as established, therefore, by these decisions that the workmen's compensation law of Pennsylvania, and the creation thereunder of the workmen's compensation fund, were acts within the State's sovereign capacity; and, moreover, that they were acts of great importance to the general welfare of the State, in its legitimate endeavor to do exact justice between conflicting interests.

3. The question therefore is, both as to the income tax and as to the special tax on insurance policies, whether this State insurance fund thus established is exempt from taxation for either one or both of the following reasons:

(a) Because it falls within the exemption in section 11 of the act as being income derived “from the exercise of any essential governmental function accruing to any State * * *.”

(b) Because, if it does not fall within this exemption, Congress has not the constitutional power to levy a tax of this character upon a State, whether the functions taxed are “essential,” or “unessential,” within the meaning of the act of September 8, 1916.

The latter is the claim of the attorney general of the State of Pennsylvania.

That there is some implied restriction in the Constitution upon the power of Congress to tax the operations or agencies of the several States is determined by the decisions of the Supreme Court. The general question first arose, naturally, in the attempts of the State governments to tax the activities of the Federal Government. In the earlier cases dealing with this subject no distinction was observed between "essential" and "nonessential" functions of the Government. The first and leading case upon the subject dealt with the bank of the United States and held that the State of Maryland had no power to levy a stamp tax on the notes issued by that bank. (*McCulloch v. State of Maryland*, 4 Wheat. 316, 436). No consideration was given by the Supreme Court in that case to the fact that the bank was merely an agency of the United States in which the interest of the United States was represented by shares of stock, and that it was engaged in a general commercial business for profit in competition with private individuals or ordinary corporations. The court summed up its conclusion upon this part of the case as follows:

"The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of *the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.*" (Italics mine.)

These same principles were held applicable to their full extent as to the power of the Federal Government to tax the operations or agencies of the several States in *Collector v. Day* (11 Wall. 113).

In the case of *United States v. Railroad Company* (17 Wall. 322, 332), a distinction between the functions of a State or one of its subordinate municipalities upon the ground that some are strictly governmental and others not was first noticed. In that case it was held that the United States had no power to levy an income tax upon the dividends received by the city of Baltimore on its stock in the Baltimore & Ohio Railroad Co. After stating the general principle that the United States had no power to tax the

operations of the several States, the court made the following statement:

"We admit the proposition of the counsel, that the revenue must be municipal in its nature to entitle it to the exemption claimed. Thus, if an individual should make the city of Baltimore his agent and trustee to receive funds, and to distribute them in aid of science, literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenues would be subject to taxation. The corporation would therein depart from its municipal character, and assume the position of a private trustee. It would occupy a place which an individual could occupy with equal propriety. It would not in that action be an auxiliary or servant of the State, but of the individual creating the trust. There is nothing of a governmental character in such a position. * * *

The question next arose in the case of *Ambrosini v. United States* (187 U. S. 1, 8), where it was held that the stamp tax levied by the Spanish War revenue act of 1898 could not constitutionally apply to bonds given in pursuance of the requirement of the Illinois liquor license law. In this case, the Supreme Court, in addition to reliance upon the general doctrine established by previous cases that the United States could not constitutionally levy a tax upon the operations or agencies of the State, also called attention to the language of section 17 of the act of 1898 which exempted from taxation States, etc., "in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing, or municipal capacity"; and held that the liquor license laws of the State of Illinois were passed in the exercise of a strictly governmental function.

In regard to this the Supreme Court said:

"But as the bonds were required by the State and the city and were issued for the benefit of the public and not for the benefit of the individuals who executed them, it appears to us that they come fairly within the meaning of the clause, assuming that they were covered by Schedule A. The question is whether the bonds were taken in the exercise of a function strictly belonging to the State and

city in their ordinary governmental capacity, and we are of opinion that they were, and that they were exempted as no more taxable than the licenses. Either they were exempt, apart from the proviso, because, in the sense of the statute, issued by the State or any city, or the proviso so far qualified the language of the enacting clause as to exempt them in exempting the State and city in respect of the exercise of strictly governmental functions."

In *South Carolina v. United States* (199 U. S. 437, 461, 463), the court, having previously held in the case of *Vance v. W. A. Vandercook Company No. 1* (170 U. S. 438), that the South Carolina liquor dispensary system was a valid exercise of the police powers of the State, held nevertheless that it was subject to the internal revenue taxation system of the United States covering the sale of liquor. The case of *United States v. Railroad Company*, *supra*, and *Ambrosini v. United States*, *supra*, were cited and quoted from, and the following statement was made in regard to them:

"These decisions, *while not controlling the question before us*, indicate that the thought has been that the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business." (Italics mine.)

The conclusion of the court was as follows:

"Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business *which is of a private nature* that business is not withdrawn from the taxing power of the Nation." (Italics mine.)

This decision has never been reversed or questioned, and must be taken as representing the established law.

Attention, however, may be called to the decision of the Supreme Court in the case of *Wilson v. Shaw* (204 U. S. 24), in which it was held that the Federal Government, under the power granted to it to regulate interstate and foreign commerce, had the power to establish and maintain the Panama Canal. It is well known that the Panama Canal had been the subject of private enterprise before the United States intervened, and that the United States purchased the rights of the private owners in the canal. It can hardly be supposed that if such a canal were constructed between the several States, its operations could be taxed by any of those States upon the theory that the canal represented not an "essential" element of the Government but simply a commercial enterprise carried on by it in competition with private interests.¹

In my judgment, the case of *South Carolina v. United States*, *supra*, must be confined to its particular circumstances. The function of the courts in this connection is merely to declare whether the acts of the several States or of the United States are within the constitutional limits prescribed to them; that is, whether they are exercising in the particular act in question their sovereign powers as defined by their respective constitutions. To determine this question, the courts have the standard of the Constitution, together with various rules of interpretation established by law. When it has once been determined that the act is within the constitutional power of the State or of the United States, there is no safe standard which the courts can employ to determine whether the particular act is essential to governmental action or not. Until such a standard is set up it seems to be exceedingly unsafe to permit speculation as to the operation and effect of various acts to control the judgment of the court upon the point of their essentiality.

¹ As to this see the decisions on the Pacific Railroads, namely, *Thompson v. Pacific R. R.*, 9 Wall. 579; *R. R. Co. v. Pentstun*, 18 Wall. 5, 35; and especially *California v. Pacific R. R.-Co.*, 127 U. S. 1, 40, 41.

It is certain that the case of *South Carolina v. United States*, *supra*, did not overrule the cases of *United States v. Railroad Company*, and *Ambrosini v. United States*. Indeed, the court expressly adopts them, and states that they are not controlling of the question before it. The only conclusion can be that the case of *South Carolina v. United States* was based upon some peculiar circumstances connected with it, as e. g., the direct entrance of the State into the liquor business for a profit, and the lack of clear connection between such a business connection and any real regulation of the liquor traffic, so that the court was justified in describing it as a "private business," and in distinguishing it on this ground from *United States v. Railroad Company* and *Ambrosini v. United States*. While I do not mean to affirm that such considerations were relevant, yet they seem to be the ones which really affected the decision of the court.

No such considerations apply to the present case. The regulation by the Legislature of Pennsylvania of the compensation to be paid employees on account of accidents occurring in the course of their employment can not be compared in any way with the entrance of the State of South Carolina into the liquor business. The action of the Legislature of Pennsylvania is entirely altruistic, without any profit whatsoever to the State, and is undertaken solely for the benefit of the people of the State. This being so, it presents such striking differences from the legislation dealt with in the case of *South Carolina v. United States* as to justify a conclusion that the present case is not governed by that decision, but is governed by the cases of *United States v. Railroad Company* and *Ambrosini v. United States*.

4. The questions involved in the present case have been somewhat confused by association with the entirely different question of the liability of a State to suit in its own courts. The rule that a State is not liable for breach of contract or for tort unless it has expressly consented to such a liability often works an injustice, and, in an attempt to escape from this rule in such cases, the courts

have drawn a distinction between what they call "essential" and what they call "unessential" governmental activities. Recoveries have been permitted against municipalities, especially where their action was deemed "unessential." The same court which held that the operations of the Bank of the United States could not be taxed by the several States, held in *United States v. Planters' Bank* (9 Wheat. 904), that a State bank in which the State of Georgia held stock could be sued because the State in interesting itself in the bank had divested itself of its sovereign character and had become a partner in a trading company. This opinion has been followed as late as *Salas v. United States* (234 Fed. 842), in regard to the Panama Railroad Co.

That cases of this character, which were largely relied upon by the Supreme Court in the case of *South Carolina v. United States*, have no bearing upon the question whether certain activities of the State, authorized by its constitution, are "essential" or not, is brought out clearly in the decisions of the Supreme Court relating to the National Home for Disabled Volunteers. In *Ohio v. Thomas* (173 U. S. 276), it was held that the State laws regulating the sale of oleomargarine could not be applied to the Home because it was an agency of the United States Government. In *National Volunteer Home v. Parrish* (229 U. S. 494), it was held that the Home was liable for interest on judgments against it, being in this respect subject to the rules governing private corporations.

It is therefore clear that the authorities dealing with the liability of a State to suit in its own courts are not controlling to determine the much more fundamental question whether the constitutional actions of a State can be divided for the purpose of taxation by the United States into "essential" and "unessential" actions.

5. One other consideration which seems to have had considerable weight with the Supreme Court in the case of *South Carolina v. United States*, *supra*, should be briefly noticed. The court called attention to the fact that, with advancing ideas as to the proper activities of the States, it

might occur that the several States would enter into practically all of the business of the country, and by that means withdraw the larger part of the objects of taxation from the scope of Federal power. In *Flint v. Stone, Tracy Co.* (220 U. S. 107), however, the Supreme Court, addressing itself to the somewhat similar argument that the power to tax is the power to destroy, after citing the cases of *Knowlton v. Moore* (178 U. S. 41), *Veazie Bank v. Fenno* (8 Wall. 533), and *McCray v. United States* (195 U. S. 27), made the following statement on page 169:

"The argument, at last, comes to this: That because of possible results, a power lawfully exercised may work disastrously, therefore the courts must interfere to prevent its exercise, because of the consequences feared. No such authority has ever been invested in any court. The remedy for such wrongs, if such in fact exist, is in the ability of the people to choose their own representatives, and not in the exertion of unwarranted powers by courts of justice."

Similarly it may be said that the consideration alluded to above as to the possibility of the States withdrawing all objects of taxation from the power of the United States is a political one, and can not be used as an argument against a lawful power of the States. Such a condition of affairs would have to be met as it arose by the legislative authorities.

I have therefore reached the conclusion that the workmen's compensation fund of the State of Pennsylvania falls within the exemption contained in section 11, paragraph (b) of the act of September 8, 1916, when that section is properly considered in the light of the general principles laid down by the Supreme Court concerning the relations of the United States to the several States.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

To the SECRETARY OF THE TREASURY.

DESIGNATION OF FLEET MAIL CLERKS.

The special designation by the Postmaster General of A. J. Cassidy, yeoman, first class, as Navy mail clerk for the Atlantic Fleet, after his selection by the Secretary of the Navy but without the promulgation by the Secretary of the Navy of a general regulation covering the designation of a Navy mail clerk for a fleet, was valid, and Yeoman Cassidy has lawfully held this position from the time fixed in his designation.

Under the provisions of the act of May 27, 1908 (35 Stat. 417), which authorize the selection and designation of enlisted men of the Navy as Navy mail clerks and provide for additional compensation for such services, the Secretary of the Navy has the power, with uncontrolled discretion, to fix the compensation of Navy mail clerks within the prescribed maximum.

DEPARTMENT OF JUSTICE,

July 19, 1918.

SIR: I have the honor to acknowledge your letter of June 26 asking my opinion on a question of law arising in the administration of your Department out of the following circumstances:

The act of May 27, 1908 (35 Stat. 417), provided in part as follows:

"That enlisted men of the United States Navy may, upon selection by the Secretary of the Navy, be designated by the Post Office Department as 'navy mail clerks' and 'assistant navy mail clerks' * * *. They shall receive as compensation for such services from the Navy Department, in addition to that paid them of the grade to which they are assigned, such sum in the case of mail clerks not to exceed five hundred dollars per annum, and in that of assistant mail clerks not to exceed three hundred dollars per annum, as may be determined and allowed by the Navy Department."

After the passage of this act the Secretary of the Navy issued certain regulations fixing the conditions under which Navy mail clerks and assistant Navy mail clerks would be designated for vessels, and the rate of their compensation. On May 4, 1917, the commanding officer of the Atlantic Fleet called the Secretary of the Navy's attention to the desirability of appointing a "fleet mail clerk" to be al-

lowed the extra compensation given to mail clerks on capital ships, and accordingly on July 26, 1917, the Secretary of the Navy recommended to the Postmaster General that Yeoman A. J. Cassidy be designated "Navy mail clerk for the Atlantic Fleet" and on July 30, 1917, Cassidy was designated accordingly by the Postmaster General. The rate of his extra compensation, however, was not fixed by the Secretary of the Navy, probably through inadvertence. On December 27, 1917, the Secretary of the Navy, assumedly pursuant to the provisions of section 8 of the act of July 31, 1894, submitted to the Comptroller of the Treasury the question as to what rate of extra compensation Cassidy was entitled to while serving as fleet mail clerk. On February 26, 1918, the comptroller rendered his opinion that Cassidy was not entitled to any extra compensation, because he had never been validly designated to the position of "fleet mail clerk". The reason for this conclusion was that the Secretary of the Navy, having adopted and promulgated regulations covering the designation of Navy mail clerks and assistant Navy mail clerks, and having neglected in his regulations to provide for "fleet mail clerks," was now without power to designate an enlisted man for such position except by using the form of new general regulations or a general amendment of the old.

You now request my opinion as to whether this ruling of the comptroller was correct and specifically whether the designation of Cassidy, made in the manner stated above and not pursuant to any general regulation, was valid.

1. It is clear that the act of May 27, 1908, *supra*, confers absolute power upon the Postmaster General and the Secretary of the Navy to designate in their uncontrolled discretion Navy mail clerks, and power upon the Secretary of the Navy, with like uncontrolled discretion, to fix their compensation within the prescribed maximum. That being so, there was no question for submission to the comptroller under the act of July 31, 1894, and his opinion therefore was extra official and has only the weight which the experience and ability of that officer justly give it. This is expressly determined by the decisions of the Court of

Claims in *Billings v. United States* (23 C. Cls. 166), *Dyer v. United States* (37 C. Cls. 337), *Hayden v. United States* (38 C. Cls. 39), and by *United States v. Jones* (18 How. 92) and *Smith, Auditor, v. Jackson* (241 Fed. 747, 757). The proper effect of such opinions of the comptroller was satisfactorily stated by Mr. Olney in 20 Op. 654.

2. Coming, then, to the question as to whether the designation of Cassidy as a "fleet mail clerk" was valid without the promulgation by the Secretary of the Navy of a general regulation, the decisive principles are stated by Comptroller Downey in his opinion to the Auditor for the State Department of January 25, 1915 (21 Comp. Dec. 482, 484), in which he says:

"Regulations, however, may be distinguished as of two kinds:

"(1) Those that are made pursuant to, or in execution of, a statute.

"(2) Those that are made by virtue of general or special authority vested in the heads of departments to effect the purposes required by law.

"Regulations of class 2 must not be inconsistent with law and relate principally to the government of the department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property, etc. Such a regulation may be termed an administrative regulation and regarded as mainly directory. It has been that such regulations may be waived or exceptions made thereto by the authority making said regulations. (See decision of this office Dec. 8, 1896, 3 Comp. Dec. 218, 220; Jan. 23, 1897, 3 Comp. Dec. 304, 305; Aug. 6, 1897, 4 Comp. Dec. 40, 42; Jan. 28, 1898, 4 Comp. Dec. 378, 387.)

"Regulations of the first class, namely, those made pursuant to or in execution of a statute, are quasi-legislative, and may be held to become a part of the law and to be of the same force as the statute itself, and though they may be changed by the authority making them they are binding on such authority as well as others so long as they are not changed, and exceptions can not be granted to them. The power to make regulations involves the power to alter,

amend, modify, or revoke the same, but said action must be general and not by specific exception or waiver, and can only be prospective, not retrospective."

The present comptroller in his opinion in this case cites this opinion of his predecessor, but evidently thinks that the regulations issued by the Secretary of the Navy in regard to Navy mail clerks and assistant Navy mail clerks fell within the first class stated by Comptroller Downey as being regulations made pursuant to, or in execution of, a statute, so that no special designation could be made outside of the regulations, or, in short, that the regulations could not be waived in special cases. In this view I think it is clear the comptroller erred. The act of May 27, 1908, *supra*, contains no provision for regulations by the Secretary of the Navy. It apparently contemplates, or at any rate would be satisfied by, a special designation of a Navy mail clerk in each particular case. If the Secretary of the Navy chose, with a view to the better business administration of the Department, to lay down certain general rules which, until he was further advised, should guide his discretion in the performance of the duties cast on him by the act, that was a proper administrative action and directly authorized by section 161, Revised Statutes. Such regulations, however, have not the force of law. Speaking of a precisely similar regulation, Mr. Moody said in 25 Op. 183, 184:

"The provision in question, therefore, seems to be one which can be made or annulled at will and enforced or waived as seems expedient. Not being demanded by law, it is not law in the sense in which that term is used in the statutory provision (Rev. Stat., sec. 356) that the opinion of the Attorney General may be required on 'any questions of law' arising in the administration of the Executive Departments. It may more properly be left for interpretation by the department or bureau to which it pertains and which is responsible for its existence and execution. (18 Opin. 521; 20 Opin. 649; 21 Opin. 255.)"

I think it is clear that the regulations issued by the Secretary of the Navy relative to Navy mail clerks fall within the second class as lucidly stated by Comptroller Downey,

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and that there was therefore no legal obstacle in the way of a special designation by the Secretary of the Navy of Cassidy as a fleet mail clerk, that this designation was entirely valid, and that Cassidy has lawfully held this position from the time fixed in his designation.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

To the SECRETARY OF THE NAVY.

CIVIL SERVICE—MEMBERS OF SAME FAMILY—
ELIGIBILITY TO APPOINTMENT.

The appointment of a person to a position in the classified service, who at the time of appointment has two members of her family in the service, one of whom entered it since her examination, is in violation of section 9 of the Civil Service Act of January 16, 1883 (22 Stat. 406), and this ineligibility to appointment is not cured by the appointing officer having inadvertently overlooked the statement in the "Declaration of appointee" that a second member of the family had entered the service subsequent to the date of her application for examination.

Where there are already two members of the same family in the classified service, the removal of residence of another member of the family after appointment for the purpose of evading the disability imposed by section 9 of the Civil Service Act will not validate the appointment.

DEPARTMENT OF JUSTICE,
July 20, 1918.

SIR: I have the honor to reply to your request for my opinion upon a question relating to the propriety of retaining in the service of the Ordnance Department of the War Department Miss Sophie B. Goldman, who is said by the Civil Service Commission to be ineligible to appointment under the provisions of section 9 of the Civil Service Act (22 Stat. 406).

Section 9 of the civil service act provides:

"Whenever there are already two or more members of a family in the public service in the grades covered by this act, no other member of such family shall be eligible to appointment to any of said grades."

From the papers forwarded by the commission, it appears that at the time Miss Goldman applied for examination, she was not within the prohibition of this section. At the time, however, she was informed of its provisions. After the examination she was sent a "Report of rating," on the back of which was printed the following:

(After stating the substance of section 9.) "As ineligibility may result from the appointment of some member or members of an applicant's family, prompt report of such appointment must be made to the commission. Eligibles are warned that they should not accept appointment contrary to this provision of law and that, if they are ineligible, any expense incurred in reporting for duty or otherwise will be at their own risk."

Thereafter Miss Goldman became ineligible for appointment because of the appointment of her sister in the classified service. She did not obey the direction to inform the Civil Service Commission of that fact. Accordingly on December 3, 1917, she was certified to the War Department as eligible to her present position and was appointed thereto. The certification was warranted by the facts in the possession of the Civil Service Commission.

Before entering upon her duties, however, Miss Goldman was required to sign a "Declaration of appointee" and upon that declaration was required to state the facts as to entry of members of her family into the service of the Government since her examination. She stated truthfully the fact that two members of her family were in the classified service, one of whom entered it since her examination. Her ineligibility ought thereupon to have become apparent to the appointing officer who was required to sign the declaration. The form provided contains just above the line for the appointing officer's signature the following:

"If the answer to question 6 includes two or more names and is not *identical* in every respect with answer to similar question in the application, this form must be submitted for approval before appointment is made".

Not only did Miss Goldman's answer to section 6 disclose her ineligibility but it was, of course, not identical with her answers to that question in her application.

Upon these facts, the appointment of Miss Goldman was obviously improper. Nor was she without fault, in that having been informed specifically of the law she had failed to give the commission the required notice of her changed status and as a result had received a certification to which she was not entitled.

But she was appointed and entered upon her duties. The commission upon discovering the facts requested her severance from the service. The War Department has taken the ground that the appointing officer's failure to observe the statement in the declaration of appointee which disclosed her ineligibility was a mere inadvertence and that, under the opinion of the Attorney General in the *Mostyn* case (30 Op. 169), it was entitled to retain Miss Goldman's services. The Civil Service Commission did not accede to this view and my opinion is now asked.

My opinion has also been requested by the Secretary of War upon substantially the same question in the cases of five other clerical employees of the War Department, in each of which cases it is conceded that the appointment was improper, but is contended that the situation resulted from inadvertences similar to that set up in the case of Miss Goldman. In these papers transmitted by the Secretary of War is a reference by the commission to an alleged statement of one of the appointing officers in question to the effect that the requirements of section 9 "did not matter at a time like this." No comment is made by the officers of the War Department upon this statement. Reference is however made to the pressure imposed upon appointing officers by the existing crisis. To this the Civil Service Commission replied in effect that the Congress has not yet seen fit to alter the law in this respect. It may be added that I am informed that a bill is now pending which, if it becomes a law, will affect the situation.

Recognizing the difficulty presented by the foregoing circumstances, the officers of the War Department have sought to meet it by suggesting to the appointees that they remove from the parental roof. In all cases but one they have done so. The reason for this suggestion lay in the fact that At-

torney General Bonaparte had ruled that one who, to the extent indicated, had severed the family relationship and become, as it were, independent thereof, had ceased to be a member of the "family" within the meaning of section 9. The Civil Service Commission said as to this that such removals in good faith before appointment might, in view of the opinion in question, have been effective, but that under the circumstances they were mere attempts at evasion and could not validate the appointments which, when made, were illegal. And the question is now presented to me.

The *Mostyn case*, in which the opinion was rendered June 5, 1913 (30 Op. 169), related to a mistake in certification by the Civil Service Commission. It was said:

"The Civil Service Commission may, at any time prior to appointment, correct a mistake in its certification, but after an appointment has been made and has been accepted by the appointee, without any fraud on his part or concealment of material facts, and the matter involved is not jurisdictional, it is then too late for the commission to attempt to correct its certification."

This opinion is one of several of which the *Hall case* (20 Op. 275) and the *Moore case* (21 Op. 289) are other examples in which appointments have been made upon certification by the Civil Service Commission which afterwards turned out to be improper. The improprieties need not be further examined than to say that in some of these cases at least there was the element of inadvertence upon which the appointing officers of the War Department now rely. If the view is accepted that the same considerations apply to an inadvertent disregard of the statute by the appointing officers of the executive departments, the principle of these cases could be extended to cover those here in question. It does not, however, seem to me that the situation is exactly analogous either as a matter of law or policy. The civil service law is primarily a check upon the previously untrammelled discretion of appointing officers. The Civil Service Commission is an administrative agency for the enforcement of that law. It is a single body with comparatively few officers. Appointing officers of the various executive departments are very numerous, and if

the principle is once established that inadvertence may be offered as a validation for an otherwise illegal appointment, it may well be, as the Civil Service Commission says, that "A mere statement of the officer before whom the declaration of appointee happened to be executed—and there are thousands of such officers—that he inadvertently overlooked the facts before him would validate the appointment and lead to widespread nonobservance of the statute." For these reasons, while I do not question the explanation made on behalf of the appointing officers that their action in the instant case was the result of inadvertence, I am not inclined to extend the opinions herein referred to beyond the specific facts to which they relate. After all, the plain mandate of the civil service law has been violated, and it was meant to be obeyed.

The removal of residence after the appointment for the purpose of evading the disability imposed by section 9 does not seem to me adequate, nor is it fairly within Attorney General Bonaparte's ruling in the *Stratton case* to the effect that a bona fide removal from the family rooftree and the setting up of a separate establishment excludes the person so removing from the "family" within the meaning of section 9 so as to make a subsequent appointment valid.

The remedy for the situation now presented, if remedy be required, would seem to be with Congress.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

To the PRESIDENT.

PANAMA CANAL—WAGES OF EMPLOYEES.

The provision of the sundry civil appropriation act of July 1, 1918 (40 Stat. 696), that "no money now or hereafter appropriated for the payment of wages not fixed by statute shall be available to pay wages in excess of the standard determined upon by the War Labor Policies Board" does not apply to the wages of employees of the Panama Canal paid under authority of section 4 of the Panama Canal Act of August 24, 1912 (37 Stat. 561).

DEPARTMENT OF JUSTICE,
July 25, 1918.

SIR: I have the honor to acknowledge the receipt of your letter of July 15, 1918, requesting my opinion upon certain questions arising under the following provision of Public Act No. 181, Sixty-fifth Congress, approved July 1, 1918:

"To enable the Secretary of Labor, during the present emergency, to furnish such information and to render such assistance in the employment of wage earners throughout the United States as may be deemed necessary in the prosecution of the war and to aid in the standardization of all wages paid by the Government of the United States and its agencies, including personal services in the District of Columbia and elsewhere, per diem in lieu of subsistence at not exceeding \$4, traveling expenses, rental of quarters in the District of Columbia and elsewhere, heat and light, telegraph and telephone service, supplies and equipment, and printing and binding, \$5,500,000: *Provided*, That no money now or hereafter appropriated for the payment of wages not fixed by statute shall be available to pay wages in excess of the standard determined upon by the War Labor Policies Board" (40 Stat. 696).

You call my attention to the fact that section 4 of the act of August 24, 1912 (37 Stat. 561), known as the Panama Canal Act, contains the following provision:

"All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same, but salaries or compensation fixed hereunder by the President shall in no instance exceed by more than 25 per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States."

You ask my opinion upon the following questions:

"1. Does the provision quoted above from the act approved July 1, 1918, apply to the employees of the Panama

Canal on the Isthmus whose salary or compensation has been or is to be fixed and paid under authority of the provision in section 4 of the Panama Canal Act quoted above, and control as to the amount of wages that may lawfully be paid to such employees?

"2. If it does apply to employees of the Panama Canal on the Isthmus, would the Panama Canal be authorized to pay not to exceed 25 per cent more for wages on the Isthmus than 'the standard determined upon by the War Labor Policies Board' for continental United States."

The proviso of the act of July 1, 1918, applies to the "payment of wages not fixed by statute." "Wages" is not otherwise defined in the proviso itself but reference to the body of the section shows that there is meant "all wages paid by the Government of the United States." Compensation paid to employees of the Panama Canal is such wages. Attorney General Moody dealing with the restrictions upon hours of labor imposed by the act of August 1, 1892, in the case of all laborers "employed by the Government of the United States," held that laborers employed in the Canal Zone were included, and he said (25 Op. 441, 445):

"If Congress had intended to limit the hours of laborers and mechanics employed by the Government anywhere * * * it would be difficult to find more apt words to accomplish that purpose than those which are used in this act."

And so it is here.

It remains, however, to determine whether the wages in question can be said to be "fixed by statute."

"Fixed" is a word which in common use suggests permanence, invariability. But when used in statutes it is often intended to have and is given by the courts a more flexible meaning. Where the context and the sense of the thing demand, it may be held to mean no more than "allow" or "determine." (*Gist v. Rackliffe-Gibson Co.*, 224 Mo. 369.)

And it has been held that a constitutional provision requiring the legislature to "fix * * * the compensa-

tion of all officers " was complied with by a statute leaving certain matters of salary largely to the discretion of county officials, within, however, a maximum set by the statute. It was said that there was a "fixing" of salaries within the meaning of the constitutional mandate if the legislature prescribed or "fixed" the rule by which such compensation should be determined. (*Cricket v. Ohio*, 18 Ohio St. 9, 1868.)

The case last cited has been followed with approval in *Flagg v. Columbia County* (51 Or. 172), and in *Gist v. Rackliffe-Gibson Co.*, *supra*.

Section 4 of the Panama Canal act sets a rule by which the maximum compensation of employees of the Panama Canal can be determined. It is "in no instance [to] exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States." This seems to me to be a fixing of the wage by statute within the principles above referred to.

This view is strengthened by the circumstances that the proviso of the act of July 1, 1918, relates only to maximum compensation, and that section 4 of the Panama Canal act in terms prescribes a statutory rule for maximum compensation. I am of opinion that the wages of those employed under this section of the Panama Canal Act are "fixed by statute" within the meaning of those words as used in the proviso of the act of July 1, 1918.

I agree, therefore, though for other reasons, with the view of the law officer of the Panama Canal that your first question is to be answered in the negative. It is therefore unnecessary to reply to your second question.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

To the SECRETARY OF WAR.

WAR FINANCE CORPORATION ACT—ADVANCES TO BANKS.

The 10 per cent limitation imposed by section 10 of the War Finance Corporation Act of April 5, 1918 (40 Stat. 509), applies to advances made by the War Finance Corporation to banks under the authority of section 7 of said act.

DEPARTMENT OF JUSTICE,
July 27, 1918.

SIR: I have the honor to reply to your request of July 15, 1918, for my opinion upon the question whether the limitations imposed by section 10 of the War Finance Corporation Act of April 5, 1918 (40 Stat. 509), apply to advances made by the War Finance Corporation to banks, bankers, or trust companies under the authority of section 7 of that act.

Section 7 of the statute authorizes the War Finance Corporation to make advances, under certain conditions, to "any bank, banker, or trust company in the United States * * * which shall have outstanding any loan or loans to any person, firm, corporation, or association conducting an established and going business in the United States whose operations shall be necessary or contributory to the prosecution of the war."

Section 10 of the act is as follows:

"That in no case shall the aggregate amount of the advances made under this title to any one person, firm, corporation, or association exceed at any one time an amount equal to ten per centum of the authorized capital stock of the corporation, but this section shall not apply in the case of an advance made to a railroad in the possession and control of the President, for the purpose of making additions, betterments or road extensions to such railroad."

The prohibition here is against an advance under Title I of the statute which exceeds in amount 10 per cent of the authorized capital stock of the War Finance Corporation, to "any one person, firm, corporation, or association" except it be a railroad in the possession and control of the President. There is in the section no qualification upon the words "person, firm, corporation, or association" other than that noted with respect to railroads. Therefore, ad-

vances to bankers, banks, and trust companies come squarely within the letter of the limitations prescribed by section 10.

Such was also the legislative intent. The section was inserted by the House of Representatives, and the report of the Committee on Ways and Means (Rept. No. 369, 65th Cong., 2d sess., p. 4) contains the following paragraph:

"This bill limits the aggregate amount of advances that can be made and outstanding under this act at any one time to any person, firm, corporation, or association to an amount not to exceed 10 per cent of the authorized capital stock of the corporation, or \$50,000,000. The original bill contained no such limitation. This provision is also believed to be a very valuable safeguard."

In explaining the matter, the chairman of the committee said in the House (Cong. Rec., 65th Cong., 2d sess., Daily issue, p. 4066):

"The bill means just exactly what it says, and the language conveys only the intention which the committee had. The committee felt that we ought to have some limit on the amount which this corporation can loan to any one person or corporation. Of course, when it loans to a bank, it loans directly to the bank. The original bill had no limitation in it at all. The corporation could loan one hundred million or a billion to any one concern. The Senate bill has no similar limitation. Now we felt it was the wisest thing to provide a reasonable limitation * * *. This bill says in language just as plain as it can be put that no concern, individual, corporation, or association can borrow of this corporation an amount in excess of ten per cent of the capital stock of the corporation, or \$50,000,000."

The occasion for these remarks was the raising of the precise question here presented, namely, whether the 10 per cent limitation applies to a loan by the War Finance Corporation to the bank or only to the disposition made by the bank of money loaned to it, i. e., whether the War Finance Corporation could advance to a bank \$300,000,000, provided the bank distributed it among "ultimate beneficiaries" in amounts not exceeding \$50,000,000.

Later in the discussion, the chairman stated that it was not the intention of the committee to prevent these ultimate beneficiaries, that is to say, persons, firms, corporations, or associations "conducting an established and going business in the United States whose operations shall be necessary or contributory to the prosecution of the war" from obtaining more than \$50,000,000 of the money put at the disposal of the War Finance Corporation, and that this could be done by placing loans with several banks, themselves primarily liable to the War Finance Corporation, though in no individual case to an extent greater than \$50,000,000 (p. 4067). He added, in response to a question whether or not section 10 was intended to protect the corporation and its loans:

"This is limited, first, in order to make secure all the money that the corporation shall loan, and another purpose is that it shall not make to any one person or concern or association a loan of more than ten per cent of its capital stock. We intended to do just what the national bank act does, which everybody knows about," and concluded that the section was "as plain as language can make it" (p. 4068).

The section as reported was afterwards amended in conference only by making a specific exception of advances to railroads which have come under Federal control. By a familiar rule of statutory construction this specific exception strengthens the view that no others were intended. Finally, it may be said that an amendment offered by Mr. Phelan, of Massachusetts, which would have so changed the phraseology of section 10 as to give much strength to the view that the limitation in question was not intended to apply to advances made to banks under section 7, was rejected by the House. (Cong. Rec., 65th Cong., 2d sess., Daily issue, p. 4070.)

Probably the only contention which can be made with any show of strength in support of the proposition that advances to banks were not intended to be affected by the limitations of section 10 is by seeking to construe the words "person, firm, corporation, or association" as meaning not the actual borrower from the War Finance Corporation,

but as meaning the "ultimate beneficiary" of the advances. This argument proceeds by pointing out that these words, "person, firm, corporation, or association" are used in that order in sections 7 and 9, and that in those sections they do refer to persons who in a sense may be said to be the ultimate beneficiaries of the contemplated use of the funds of the Government.

Upon examination, however, this contention does not appear to be tenable. In the first place, what is important in the description of the "ultimate beneficiaries," so called, is that the person, firm, corporation, or association in question is to be one "conducting an established and going business in the United States whose operations shall be necessary or contributory to the prosecution of the war." These modifying clauses do not appear in connection with the words "person, firm, corporation, or association" as they are used in section 10. If an identical meaning is to be argued from the use of identical words in different sections of the statute, it would seem that the identity should extend to all of the group of descriptive words and not merely to those that are less important. It seems impossible to escape the conclusion that the use of the words "person, firm, corporation, or association," was simply to describe by an inclusive phrase the possible parties to dealings with the War Finance Corporation and have no further significance.

And the reason of the thing supplies a much more conclusive answer. Section 7 applies to cases where loans have been made by the bank before its application to the War Finance Corporation; indeed, even before the passage of the act. A borrower who receives his money before an advance is made by the War Finance Corporation to the lending bank can hardly be said in any sense to be a beneficiary of such an advance. The bank to whom the advance is made is the direct beneficiary thereof, and the indirect beneficiaries, if any, are those borrowers in the future who may benefit by the increase in funds which becomes available to the bank as a result thereof. Nothing can be made, therefore, of the proposition that the limitations of section 10 apply only to the receipt of funds by

“the ultimate beneficiary” and not to the advance to the real borrower, namely, the bank.

As pointed out, the specific exception of railroads in the provisions of section 10 strengthens the view that no other exceptions were intended. It may be added that it is apparent that the advance thus freed from the restrictions of section 10 is an advance made directly to the railroad itself by the War Finance Corporation under the provisions of section 9.

The provisions of Title I of the War Finance Corporation act indicate clearly the intention of Congress to secure in every manner reasonably possible the advances made by the War Finance Corporation. Distribution of loans among many banks, each personally liable, is an obvious measure of security. As was pointed out on the floor of the House of Representatives, the national banking act furnishes a well-known example which was copied. Taking together the manifest intention of the Congress with the plain language employed by it, it seems to me impossible to escape the conclusion that the limitations of section 10 of the War Finance Corporation Act apply to advances made to banks under section 7 of that Act.

Respectfully,

G. CARROLL TODD,
Acting Attorney General.

To the PRESIDENT.

GOVERNMENT CONTRACTS—SIGNING OATH OF DISINTERESTEDNESS AND FILING RETURN.

In making the return of a contract on behalf of the Government, as provided for in sections 3744 and 3745 of the Revised Statutes. If the officer who personally makes the contract himself makes the oath of disinterestedness and files the return in the Returns Office of the Department of the Interior (assuming that the officer manually signing the contract is the officer who makes it in the sense of being responsible for its terms) the letter and spirit of the law are satisfied.

DEPARTMENT OF JUSTICE,
July 30, 1918.

SIR: In your letter of June 13, 1918, you request my opinion upon a question which has arisen regarding the

method of complying with the requirements of sections 3744 and 3745 of the Revised Statutes of the United States with respect to certain contracts made by officers of the War Department. The sections referred to are as follows:

Revised Statutes, section 3744:

"It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return."

Revised Statutes, section 3745:

"It shall be the further duty of the officer, before making his return, according to the preceding section, to affix to the same his affidavit in the following form, sworn to before some magistrate having authority to administer oaths: 'I do solemnly swear (or affirm) that the copy of contract hereto annexed is an exact copy of a contract made by me personally with ———; that I made the same fairly without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said ———, or any other person; and that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided.'"

You state that because of the large volume of business transacted by his office, the Chief of Ordnance, by an order dated June 5, 1918, has designated certain officers of the Procurement Division as persons authorized to sign con-

tracts in the name of the head of that division, adding (after the word "by") their individual signatures. It is assumed that these officers are the persons who actually negotiate the contracts, and on the part of the Government are responsible for their terms. You state that the Ordnance Department has taken the position that the oath of disinterestedness required by section 3745, above quoted, is to be made by the officer who in fact signs the contract, and that it is he who should file the copy of the contract in the Returns Office of the Department of the Interior. You transmit to me a memorandum prepared by the Judge Advocate General, in which this position is approved by him, and you ask my opinion with respect thereto. It appears that the Returns Office of the Interior Department objects to this practice upon the ground that as the head of the Procurement Division is named in the contract as the contracting officer, he also should execute an oath of disinterestedness, although in fact he took no part in the making of the contract.

Answering only the limited question thus presented and answering it only upon the assumption that the officer manually signing the contract is the officer who makes it in the sense of being responsible for its terms, I concur in the opinion of the Judge Advocate General. The oath of disinterestedness should be made by the officer actually concerned in and responsible for the making of the contract, and I do not think the situation is affected by the circumstance that technically the contract is made in the name of the head of the Procurement Division. The form of the oath required by the statute is that the copy sent to the Returns Office is a copy of a contract made by the affiant "personally." If the officer who personally makes the contract himself makes the oath and files the return the letter and spirit of the law, it seems to me, are satisfied.

Respectfully,

G. CARROLL TODD,
Acting Attorney General.

To the SECRETARY OF WAR.

SELECTIVE SERVICE ACT—LIABILITY TO MILITARY SERVICE OF NEUTRAL DECLARANTS.

The amendment of section 2 of the Selective Service Act, which is set forth in section 4, chapter 12, of the Army appropriation act of July 9, 1918, provides for the exemption from military service, upon conditions therein set forth, of all citizens or subjects of countries neutral in the present war who have declared their intention to become citizens of the United States, including those who had been drafted into the military service at the time of its enactment.

DEPARTMENT OF JUSTICE,

August 15, 1918.

SIR: I have the honor to acknowledge receipt of your letter of the 29th ultimo requesting my construction of the recent amendment to section 2 of the Selective Service Act (40 Stat. 76, 77-78) exempting from liability to military service under certain conditions citizens or subjects of neutral countries who had declared their intention to become citizens of the United States.

Section 2 of the Selective Service Act as originally passed provided that the draft "shall be based upon liability to military service of all male citizens, or male persons not alien enemies *who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive.*" (Italics ours.)

The amendment, passed July 9, 1918, as section 4 of chapter 12 of the Army appropriation act, Public No. 193, Sixty-fifth Congress (40 Stat. 885), and set forth in full in the margin¹—after reenacting that the draft "shall be

¹ SEC. 4. That the second sentence of section two of the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen, be, and is hereby, amended to read as follows:

"That such draft as herein provided shall be based upon liability to military service of all male citizens or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this act. *Provided, That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States.*

based upon liability to military service of all male citizens or male persons not alien enemies who have declared their intention to become citizens between the ages of twenty-one and thirty years," added the following proviso:

"Provided, That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States."

The specific question is, Does this exemption embrace only persons of the designated class drafted *after* its enactment, or does it embrace also those who had been drafted into the military service at the time of its enactment?

It must be admitted that either construction is consistent with the letter of the exemption. The more natural construction of the language of the amendment, however, is that the proposed exemption includes neutral nationals who had been drafted into the service at the time of its enactment, as well as those not yet drafted. The amendment uses the expression, "shall be relieved from liability to military service." This phrase, "liability to military service" is plainly broad enough to include liability to continuance in military service as well as liability to induction into military service; for a man certainly remains liable to military service so long as he is lawfully and against his will retained in the service.

There is not involved in this issue any question as to the retrospective or prospective operation of the amendment. Future discharge from the service into which a man has been lawfully inducted is as much a prospective operation as is relief from future induction into such service.

While, therefore, either construction is consistent with the letter of the statute, I am of the opinion that the preferable construction of the language of the exemption is in

favor of holding it to cover men who had been drafted at the time of its enactment, and this interpretation is supported by the legislative history of the language under consideration. This history shows that the amendment was introduced and adopted for the purpose of relieving our relations with neutral countries from the embarrassments and liabilities arising out of the protests of these neutral countries against the compulsory military service of their nationals. As appears from the records of the State Department, some of these protests were based upon express treaty stipulations and others upon well recognized principles of international comity, and both types of protest were expressly referred to on the floor of Congress by the sponsors of the amendment. Many, if not most, of these protests were directed against individual cases of induction of individual neutral nationals into the service, and were not restricted to expressions of objection to the general statutory policy represented in the Selective Service Act. Senator Chamberlain introduced the amendment which, in a somewhat changed form, was finally adopted; and in his explanation to the Senate of its purpose he referred to this fact of an embarrassing international situation created by these protests of neutral countries against the actual retention of their nationals in the service and stated the purpose of the amendment to be the relief from this condition. His remarks plainly show that he had in mind to cure the situation which had arisen by reason of the induction of neutral nationals into the service as well as to prevent similar embarrassments in the future. Furthermore, Senator Hitchcock, who had introduced an amendment of the same general tenor and effect and which he later incorporated into Senator Chamberlain's proposal, explained his purpose by referring to the international complications which had arisen out of the actual drafting of neutral nationals. (See 56 Cong. Rec., pp. 8248, 8417, 8418.)

It is thus fairly to be inferred from the legislative history of the amendment that Congress intended to remove this strain upon our relations with neutral countries, by providing for the relief from further military service of all neutral nationals who might desire such relief and be will-

ing, for the accomplishment of this desire, to forfeit all right to American citizenship. This legislative history of the amendment therefore tends to support the more natural and less strained interpretation of its language.

I beg to conclude, therefore, that in my opinion the amendment of section 2 of the Selective Service Act set forth in section 4 of chapter 12 of the Army appropriation act passed July 9, 1918, provides for the exemption from military service, upon the conditions therein set forth, of all citizens or subjects of countries neutral in the present war who have declared their intention to become citizens of the United States, including those who had been drafted into the military service at the time of its enactment.

Faithfully, yours,

T. W. GREGORY.

TO THE PRESIDENT.

PORTO RICO—LEGALITY OF BOND ISSUE.

The proposed issue of bonds by Porto Rico to the amount of \$500,000 for the construction of roads and bridges, as provided by act No. 71 of the Legislative Assembly of Porto Rico of April 13, 1916, not being in excess of the limit of indebtedness imposed by section 3 of the act of Congress of March 2, 1917 (39 Stat. 953), and the form of the proposed bonds complying with the conditions prescribed by the regulation of the executive council of Porto Rico of April 2, 1918, said bonds will be the valid and binding obligations of the people of Porto Rico.

DEPARTMENT OF JUSTICE,

August 19, 1918.

SIR: I have the honor to acknowledge receipt of your letter of August 8, 1918, requesting my opinion as to the legality of a proposed issue of bonds of the people of Porto Rico to the amount of \$500,000, for the construction of roads and bridges in Porto Rico, the said issue being authorized by act No. 71 of the Legislative Assembly of Porto Rico approved April 13, 1916.

In an opinion rendered August 11, 1916, I had occasion to pass upon an issue of \$500,000 of the bonds authorized to the total amount of \$2,000,000 by said act No. 71 of

April 13, 1916, of which the present is a further issue. I pointed out that the general power of the people of Porto Rico to issue bonds under the provisions of section 38 of the organic act approved April 12, 1900, had been fully considered by my predecessors (Op. 27, 104; 28 ib. 245; 29 ib. 468), and held that the issue there in question was legal.

The act of April 12, 1900, has been superseded by the act of Congress approved March 2, 1917 (39 Stat. 951), entitled "An act to provide civil government for Porto Rico, and for other purposes." Section 3, which reads in part as follows:

"* * * and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law, and to protect the public credit: *Provided, however,* That no public indebtedness of Porto Rico or of any subdivision or municipality thereof shall be authorized or allowed in excess of seven per centum of the aggregate tax valuation of its property."

is identical with the provision on the same subject in the act of April 12, 1900.

My opinion of August 11, 1916, is therefore applicable to the present issue since the circumstances under which it is to be made and the law authorizing it are not different from those existing when that opinion was written.

It appears from the letter of the assistant secretary and is confirmed by the affidavit of the treasurer of Porto Rico that this additional issue will not cause the public indebtedness of Porto Rico to exceed 7 per cent of the aggregate tax valuation of its property, which is the limit placed upon such an indebtedness by section 3 of the act of March 2, 1917.

Inclosed with your letter is a certified copy of the resolutions of the executive council of Porto Rico, under date of April 2, 1918, stating the form in which the said bonds are to be issued. The conditions therein prescribed for these bonds have been compared with the governing sections of the act of April 13, 1916, and you are advised that

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the bonds, if issued under the conditions so prescribed, will, in my judgment, be the valid and binding obligations of the people of Porto Rico.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF WAR.

FOOD ADMINISTRATION GRAIN CORPORATION.

The Food Administration Grain Corporation, as an authorized agent of the President, may lawfully extend its operations to include the buying, selling, and storing of rye, barley, oats, rice, corn, and other cereals, in order to coordinate the flow of such commodities to seaboard over our railways and to assure the civil population of our own country as well as the allies a sufficient amount thereof, and to provide sufficient distribution for the Army and Navy of the United States and the allies.

DEPARTMENT OF JUSTICE,

August 31, 1918.

SIR: The Department has received your letter of the 28th instant inquiring, in substance, whether the Food Administration Grain Corporation, one of the agencies of the United States Food Administration, now engaged in buying, selling, and storing wheat, may lawfully extend its operations to include rye, barley, oats, rice, corn, and other cereals, "in order to coordinate the flow of [such commodities] to seaboard over our railways and to assure the civil population of our own country as well as the Allies a sufficient amount thereof, and to provide sufficient distribution for the Army and Navy of the United States and the Allies."

The Food Administration Grain Corporation was incorporated in New Jersey in August, 1917, in pursuance of an order of the President. Authority for the creation of the corporation may be found in section 2 of the Food Control Act (40 Stat. 276). The capital stock of the corporation, amounting to \$150,000,000, is entirely owned by the United States, having been paid for from the appropriation provided for in section 19 of the act, which appropriation was made "for the purposes of this act."

Among other things, the corporation was organized "to purchase, or otherwise acquire, manufacture, sell or otherwise dispose of, store, handle, or otherwise deal in and with, grain, food feeds, and their products, and to do all acts and things necessary, expedient, or incidental to the efficient conduct of said business." But whatever may be the objects of its incorporation as expressed in its charter, the corporation as a governmental agency can exercise no powers not expressly or impliedly conferred by Congress.

Thus far the operations of the corporation, restricted as aforesaid to buying, selling, and storing wheat, have been expressly authorized. By section 11 of the Food Control Act it is provided—

"That the President is authorized, from time to time, to purchase, to store, to provide storage facilities for, and to sell for cash at reasonable prices, wheat, flour, meal, beans, and potatoes. * * * "

Authority to extend the operations of the corporation to other foodstuffs, it is suggested, is conferred by section 10 of the act, reading in part as follows:

"That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor." * * *

1. Whether the specific enumeration of the five articles of food in section 11 is to be regarded as a definite limitation upon the power of the Executive in any case to engage in the buying, selling, or storing of commodities, or whether it is to be treated simply as a limitation upon the power to deal in foodstuffs for a particular purpose, depends upon the intention of Congress, which in this instance is clearly disclosed by a consideration of the legislative history of the section.

In the bill as passed by the House the provision for buying, selling, and storing foodstuffs included all articles defined in section 1 as "necessaries." (55th Cong. Rec., pt 5, p. 4626.)

In the Senate it was proposed by the committee to change the wording of the provision and to add it as a second clause to the provision for requisitioning food-stuffs. The provision as proposed by the committee read as follows:

“(b) In order to guarantee reasonable prices to the producer and to the consumer, to purchase, in no case paying a less price than the minimum price, if any, fixed in pursuance of this act, to store, to provide storage facilities for, and to sell at reasonable prices, foods, feeds, and fuels.” (Id. p. 4626.)

A number of the Senators objected that to incorporate the provision in the same section with the provision for requisitioning necessities would cause confusion, since the purpose of the one was “to guarantee reasonable prices” while the purpose of the other was “to secure an adequate supply of necessities for the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense.” (Id. 4627, 4654, 4655, 4715.) Subsequently the amended provision was adopted as a separate section. (Id. 4717.)

Just before the passage of the bill Senator Chamberlain offered a substitute for the amended section limiting the power to buy, sell, and store to six specified commodities, which was adopted without debate. The substitute provided as follows:

“That the President is authorized, from time to time, in order to guarantee reasonable prices to the producer and to the consumer, to purchase, to store, to provide storage facilities for, and to sell at reasonable prices, fuel, wheat, flour, meal, beans, and potatoes. * * *.” (Id. 5301.)

The conferees then amended the section by striking out the statement of its purpose, which appeared clearly enough from its provisions, and by striking out the word “fuel,” adequate provision for the distribution of fuel having been made elsewhere in the act. (Id. 5709-5710.)

This brief review of the legislative proceedings reveals quite clearly that Congress regarded the two sections as having different purposes, so different that it was not

deemed advisable to include the two provisions in the same section. It follows, therefore, that the specific enumeration of the five articles in section 11 was intended only as a limitation upon the power of the Executive to deal in foodstuffs for a particular purpose, namely, "to guarantee reasonable prices to the producer and to the consumer"; and was not intended as a limitation upon any powers of buying, selling, and storing impliedly conferred by section 10, the stated purpose of which is to secure an adequate supply of "foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense."

2. Proceeding to a consideration of section 10, it does not expressly authorize the President to buy or sell any commodities. It authorizes the President from time to time to "requisition" foods, feeds, fuel, and other supplies, But a "requisition," or "impressment," as it was formerly called, is no more than a forced sale, and implies the payment of compensation. Under this section the President is required to "ascertain and pay a just compensation" for the supplies requisitioned, and it is provided that if the compensation so determined by the President be not satisfactory to the person entitled to receive it, such person may be paid 75 per cent of the amount so determined and shall be entitled to sue the United States to recover such further sum as will constitute a just compensation. A requisition under the provisions of the section, therefore, differs from an ordinary sale only in that there is not a voluntary parting with the title to the goods; and it would be absurd to say that the President, having the power under this section to requisition foods, feeds, and fuel, could not do that which is easier and more in accordance with ordinary procedure, namely, obtain the supplies by voluntary agreement. The greater power includes the lesser.

3. The powers of requisition and purchase conferred by section 10, however, may only be exercised for three more or less related purposes, as follows: (1) For the support of the Army, (2) the maintenance of the Navy, and (3) any other public use connected with the national defense. It

remains, therefore, to consider whether the objects for which it is desired to extend the operations of the Food Administration Grain Corporation are within the purposes of the section. While apparently it is not proposed to purchase the grain for the immediate use of the Army and Navy, these objects look to the securing of an adequate supply for that purpose. But in view of the liberal construction that has been given the expression "any other public use connected with the common defense," it will not be necessary to base a conclusion on that fact. In an opinion to the President dated January 2, 1918, the Attorney General held that under section 10 the United States Food Administration was authorized to requisition 15,000 tons of cottonseed cake which the owners had refused to sell and which was urgently needed to preserve the cattle herds of Texas, which were dying of starvation. Taking into view the purposes of the act, as expressed in section 1, which provides that "it is essential to the national security and defense * * * to secure an adequate supply and equitable distribution * * * of foods, feeds * * * and fuel * * * and to establish and maintain governmental control of such necessities during the war," the Attorney General held that the purpose for which it was proposed to requisition the cottonseed cake was a "public use connected with the common defense."

The objects for which it is proposed to extend the operations of the Food Administration Grain Corporation may with even more reason be said to come within the purposes of section 10.

4. The question whether the Food Administration Grain Corporation, having purchased the grain under the provisions of section 10, would possess the power to resell it when necessary, may be answered on the authority of the above opinion. In holding that the power to sell was implied as a necessary incident of the power to requisition, the Attorney General said:

"But it seems clear that, if the public use for which the necessities are authorized to be requisitioned under section 10 or produced under section 12 requires their sale or other disposition, the power to make such sale or disposi-

tion would, without express grant, be implied as necessarily incidental to the grant of power to requisition or produce.

"Moreover, section 1 expressly provides: 'The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this act.'"

I am of opinion, therefore, that the Food Administration Grain Corporation, as an authorized agent of the President, may lawfully extend its operations in the manner and for the purposes above set forth.

Respectfully,

T. W. GREGORY.

TO THE UNITED STATES FOOD ADMINISTRATOR.

AFFIXING FACSIMILE SIGNATURE TO ORDERS, VOUCHERS,
ETC.

The affixing of the stamped facsimile signature of the Chief of the Bureau of Navigation to orders, vouchers, etc., properly initialed by officers duly authorized to affix the same thereto, under the direction and control of the Chief of the Bureau of Navigation, is a sufficient approval thereof by the Chief of the Bureau of Navigation.

The Chief of the Bureau of Navigation can not transfer to others any duty which the law imposes upon him in connection with the approval of orders, vouchers, etc., but after he has in some appropriate way passed judgment in such cases, the manual act of affixing his signature in evidence of his approval may be done by others thereunto duly authorized by him.

DEPARTMENT OF JUSTICE,

September 23, 1918.

SIR: I have the honor to acknowledge receipt of your letter of September 7, 1918, in which my opinion is asked upon the question whether the signature of the Chief of the Bureau of Navigation, in the form of a facsimile stamp affixed by an officer on duty in the bureau, pursuant to the orders and under the direction of the Chief of Navigation, and initialed by the officer authorized to affix the same thereto is a valid signature and conveys the authority of the chief of the bureau in all cases where he is authorized to act.

From the opinion of the Judge Advocate General annexed to the above-mentioned letter it appears that there is no statute which requires the signing of the orders, vouchers, etc., concerning which this question is asked by the Chief of the Bureau of Navigation. The provisions of law and the regulations respecting this matter require only that the orders and vouchers be approved by the Department or by the Chief of the Bureau of Navigation.

It further appears from the said opinion, that the Chief of the Bureau of Navigation of the Navy Department in July, 1918, delivered to two officers on duty in the said bureau rubber stamp facsimiles of his signature with the following instructions, "This stamp 'L. C. Palmer' when used and initialed by you is my official signature."

Attorney General Wirt, answering a very similar inquiry (1 Op. 670, 672), said:

"The adoption and acknowledgment of the *signature*, though written by another, makes it a man's own. As to usage, and even official usage, I believe that by far the greater part of our judicial records are not signed by the clerk of the court himself, but are signed by deputies, who use the name of the clerk on a mere general verbal authority.

"There would be great difficulty in maintaining the proposition as a legal one, that when the law required *signing*, it means that it must be done with pen and ink. No book has laid down the proposition, or even given color to it. I believe that a signature made with straw dipped in blood would be equally valid and obligatory; and if so, where is the legal restriction on the implement which the signer may use? If he may use one pen, why may he not use several?—a polygraph, for example, or types—or a *stamp*, which the court, in *Lemaign vs. Stanley*, said would be a sufficient satisfaction of the statutory requisition of *signing*. The law requires *signing* merely as an indication and proof of the parties' assent. It places the Treasury of the United States under the guardianship of the Secretary. It requires that no money shall be drawn from the Treasury without his authority. The evidence which it demands of

his authority, is, that the warrants shall be signed by him; but as to the method of *signing*, that is left entirely to himself. He may write his name in full, or he may write his initials; or he may print his initials with a pen; that pen may be made of a goose quill, or of metal; and I see no *legal* objection to its being made in the form of a stamp or copperplate. It is still his act; it flows from his assent, and is the evidence of that assent. * * * It is true, that the stamp may be forged; but so also may the autograph of the Secretary. There would, perhaps, be more difficulty in the latter case than in the former; and the superior facility of forging a stamp, or a copperplate, may be a very good reason why the legislature should, by a positive law, prohibit the use of it, and define the *manner* in which the *signing* shall be done. They have not yet defined it; and the word *signing* does not, as we have seen, necessarily imply, *ex vi termini*, the use of pen and ink, held and guided by the hand of the Secretary himself; it does not imply it *in legal acceptance, at least.*"

This reasoning has been accepted in subsequent opinions of the Attorney General.

In my opinion, therefore, the affixing of this facsimile signature properly initialed by officers duly authorized thereto, under the direction and control of the Chief of the Bureau of Navigation, is a sufficient approval by the Chief of the Bureau of Navigation of the orders, vouchers, etc., which are the subject of this opinion.

I do not mean by this, of course, that the Chief of the Bureau of Navigation can transfer to others any duty which the law imposes upon him in connection with the approval of orders, vouchers, etc. What I do mean is, that the Chief of the Bureau having in some appropriate way passed judgment in such cases, the manual act of affixing his signature in evidence of that fact may be done by others thereunto duly authorized by him.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE NAVY.

LICENSES TO USE ENEMY OWNED PATENTS.

The Federal Trade Commission has power, by virtue of the authority delegated to it under section 10 (c) of the Trading with the Enemy Act of October 6, 1917 (40 Stat. 420), to issue licenses to use American patents where the record title to such patents is in an enemy but the equitable title thereto rests in an American citizen.

DEPARTMENT OF JUSTICE,
October 25, 1918.

SIR: I have the honor to reply to your letter of August 13, 1918, calling my attention to an opinion by the Federal Trade Commission, dated July 31, 1918, in the matter of the application of the Splitdorf Electrical Co. for licenses under United States Patents Nos. 1,014,824 and 1,030,817, and asking me whether the Federal Trade Commission has power by virtue of the authority delegated to it under section 10 (c) of the Trading with the Enemy Act (40 Stat. 420), to license the Splitdorf Electrical Co. to use these patents.

In its opinion of July 31, 1918, the Federal Trade Commission found that the legal title to United States patents Nos. 1,014,824 and 1,030,817 is in the firm of Robert Bosch, of Stuttgart, Germany. It also found that in February, 1913, the firm of Robert Bosch offered to sell these patents to the Bosch Magneto Co., an American corporation, and that the latter company wrote in May, 1913, accepting this offer. The commission did not decide whether the facts disclosed in the record established that the firm of Robert Bosch is bound in equity to transfer these patents to the Bosch Magneto Co., but it made that assumption for the purposes of the case. It ordered the issuance of nonexclusive licenses under the patents to the Splitdorf Electrical Co., notwithstanding the objection of the Bosch Magneto Co. The stock of the latter company is now held by the Alien Property Custodian.

Simply stated the question is whether in a case where the record title to an American patent is in an enemy, who, however, is alleged to have so bound himself by contract as to vest complete equitable ownership in an

American citizen, the Federal Trade Commission has power, under section 10 (c) of the Trading with the Enemy Act, to issue licenses to use the patented invention. If it has such power, a further question arises whether the alleged existence of the contract referred to imposes any limitations upon the manner in which the commission can exercise its power.

The commission is of the opinion that it has the power to grant licenses to use such a patented invention under the section in question. It points out that though even if it were true that the American citizen is in equity the owner of the patent, nevertheless, the enemy patentee retains the power, if not the right, to assign the patent to another, and such other, if bona fide and without notice of the outstanding equity, may exclude all persons including the equitable owner from the use of the patented invention. *Gates Iron Works v. Fraser*, 153 U. S. 332, 349. In other words, there is here a situation of equal equities, in which the legal title is allowed to prevail. The commission says, therefore, that the enemy has legal ownership and actual control within the meaning of the statute in question. I agree with it and concur in its view that the power to issue licenses under such a patent is conferred upon it.

With respect to the suggestion that in so doing it would disregard a claimed existing equity in an American citizen, it is to be remembered that the statute does not require the President or the Commission acting for him in the matter to investigate and pass upon the many varied and difficult questions of fact, of which such a claim is one which could be raised by skillful patent lawyers in opposition to the granting of a license. It was intended to provide for a speedy administrative determination by which a patent controlled by an enemy is made available to American users where the public interest so dictates. In the pursuance of its duty to make such grants of license only when convinced that they are "for the public welfare," it is to be presumed that the commission will so mold its action as to protect fairly any rights of American citizens which may be brought to its notice.

354 *Allowances to Inmates of St. Elizabeths Hospital.*

I am therefore of the opinion that the Federal Trade Commission has, under the Trading with the Enemy Act, power to grant the license which is the subject of the present request for my opinion.

Respectfully,

T. W. GREGORY.

TO THE ALIEN PROPERTY CUSTODIAN.

ALLOWANCES TO INMATES OF ST. ELIZABETHS HOSPITAL.

Allowances under sections 4756 and 4757 of the Revised Statutes which accrue to inmates of St. Elizabeths Hospital should be paid to the superintendent of the hospital, notwithstanding such inmates are represented by a legal guardian or committee.

DEPARTMENT OF JUSTICE,

November 23, 1918.

SIR: I have the honor to respond to your request, under date of October 23, 1918, for my opinion whether in cases where the allowances under sections 4756 and 4757 of the Revised Statutes are payable to inmates of St. Elizabeths Hospital, who are represented by a legal guardian or committee, such allowances should be paid to the said guardian or committee or to the superintendent of the hospital.

It appears from the correspondence which you submit that all the administrative officers concerned agree that allowances under these two sections which accrue to inmates of the National Home for Disabled Volunteer Soldiers, and the Naval Home, should be dealt with as other pensions and are controlled by the laws for the payment and disposition of pensions of the inmates of the Soldiers' Home. I see no reason why the same conditions do not apply in cases of inmates of St. Elizabeths Hospital.

The provisions of the act of July 1, 1898 (30 Stat. 597, 623), mentioned in the correspondence submitted, was as follows:

"The superintendent of the Government Hospital for the Insane shall deposit in the Treasury of the United States, in his name as agent, all funds now in his hands or which may hereafter be intrusted to him by or for the use of patients, which shall be kept as a separate account;

and he is hereby authorized to draw therefrom on his order, from time to time, under such regulations as the Secretary of the Interior may prescribe, for the use of such patients, but not to exceed for any one patient the amount intrusted to the superintendent on account of such patient; and he shall give a separate bond, satisfactory to the said Secretary, for the faithful performance of his duties in respect to these funds as herein provided."

The act of February 2, 1909, chapter 58, section 1 (35 Stat. 592), (R. S. sec. 4839, as amended), contains similar provisions for the care and custody of funds accruing to an inmate of the hospital. It further provides:

"During the time that any pensioner shall be an inmate of the Government Hospital for the Insane, all money due or becoming due upon his or her pension shall be paid by the pension agent to the superintendent or disbursing agent of the hospital * * * and disbursed and used * * * for the benefit of the pensioner * * * and to pay his or her board and maintenance in the hospital."

There is no provision in either of these statutes authorizing or directing the payment of any such funds to the guardian or committee of the pensioner while an inmate. In the latter act it is provided that any remainder of such pension money may be "paid to the pensioner or the guardian of the pensioner in the event of his or her discharge from the hospital"; and there are appropriate provisions for the disposition of any unexpended balance to the relatives of the pensioner after his death.

By a departmental rule, made on January 14, 1909, by the Assistant Secretary of the Interior, and modified on January 30, 1909, it was declared that the allowances under sections 4756 and 4757 of the Revised Statutes to persons in the Government Hospital for the Insane, were their personal property, and in cases where the beneficiary was under a legally established guardianship payment should be made by the pension agent to the duly authorized guardian. It seems now to be contended that this order established a custom which warrants a departure from the general method which obtains with reference to the pay-

ment of similar pensions accruing to the inmates of the other two institutions above mentioned.

It is true that in my opinion of April 11, 1918 (31 Op. 268), in which I held that while allowances under sections 4756 and 4757, Revised Statutes, were to be regarded as "pensions" within the meaning of that word as used in certain sections of the Revised Statutes, their payment was not affected by the prohibition of section 4715 of the Revised Statutes, some emphasis was laid upon a long-established practice of the Government which Congress may have been presumed to have sanctioned and adopted by its subsequent enactments.

But the regulations of the Interior Department here in question became effective as modified only upon January 30, 1909, and the statute last referred to was passed upon February 2, 1909. The contention that between January 30, 1909, and February 2, 1909, a practice arose and became so established as to warrant the presumption that Congress, in framing the act of February 2, intended to adopt it seems hardly tenable.

I am of opinion, therefore, that the method of payment of allowances under sections 4756 and 4757 of the Revised Statutes accruing to inmates of St. Elizabeths Hospital should follow the practice agreed to be proper with respect to the inmates of the National Home for Disabled Volunteer Soldiers and inmates of the Naval Home; and that the fact that as to other property of these incompetents a committee or guardian has been appointed has no relevant bearing upon the question.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE INTERIOR.

TRIAL OF SPIES BY MILITARY TRIBUNALS.

A person apprehended upon United States territory not under martial law, who had not entered any camp, fortification, or other military premises of the United States and who had not come through the fighting lines or field of military operations, can not be tried as a spy by a military tribunal, and to such a case sec-

tion 1343 of the Revised Statutes and article 82 of the Articles of War can not constitutionally be applied.

DEPARTMENT OF JUSTICE,

November 25, 1918.

Sir: As I understood the present status of the case of Pable Waberski, concerning which you wrote under date of October 30, 1918, the commanding officer, who has custody of Waberski, at first treated the case as one which did not require submission to you; that when this came to the attention of the office of the Judge Advocate General, that office advised the commanding officer to transmit the case to you, which was done, and it is now under consideration by the Board of Review of the Judge Advocate General's office.

The facts as reported to me are that Pable Waberski, a Russian national, was sent to the United States by Von Eckhardt, the German ambassador to Mexico, carrying a cipher message in the German consular code signed by Von Eckhardt, which constituted Waberski's credentials as a German agent or spy. He is alleged to have informed the two men who accompanied him (who, without his knowledge, were American and British secret service men) that he was coming to the United States to "blow things up in the United States," and that he had in the past been engaged in exploding and wrecking munition barges, powder magazines, and other war utilities in the United States. He is said to have practically admitted himself to be a German spy. Immediately upon touching the border—that is, the moment he touched foot upon United States territory at Nogales, Ariz.—he was apprehended by the military authorities. He had not entered any camp, fortification or other military premises of the United States. He had not, so far as appears, been in Europe during the war, so had not come through the fighting lines or field of military operations. Martial law had not been declared at Nogales or thereabouts nor anywhere in the United States, and the regular federal civilian courts were functioning in that district and throughout the United States with at least their normal efficiency.

The military authorities claim the jurisdiction to hold and try him by court-martial as a spy. The immediate question involved in the case is whether the military authorities and a court-martial lawfully have this jurisdiction. Their claim is based upon the provisions of section 1343 of the United States Revised Statutes and article 82 of the Articles of War, which are practically identical in language and read as follows:

"SEC. 1343. All persons who, in time of war, or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial, or by a military commission, and shall, on conviction thereof, suffer death."

Article 82 of the Articles of War:

"Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death."

As Waberski was not found in or about any army fortification, post, quarter, or encampment, the claim of military jurisdiction over his case must be based upon the words "or elsewhere" in the above statutes; whatever may have been the meaning of those words intended by the framers thereof, they must be interpreted in the light of the Constitution of the United States; for to the extent to which any interpretation of these words would bring these statutes into conflict with the Constitution, they are void and of no legal effect. The first question to be decided is, therefore, What are the limitations which the Constitution imposes upon the broad provisions of the said statutes or upon the interpretation of the words "or elsewhere"?

The provisions of the Constitution involved in this question are the following:

Section 1 of Article III of the Constitution provides:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the

Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuation in office."

Section 2 of Article III provides:

"The trial of all crimes except in cases of impeachment shall be by jury; * * *"

The fourth amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The fifth amendment provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; * * *"

The sixth amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

As I view it, the authoritative application of these Constitutional provisions to the question of the scope of military jurisdiction over civilians was made by the Supreme Court of the United States in the case of *Ex Parte Milligan*, 4 Wallace, page 2. That case was concerned primarily with the question of the jurisdiction of a military court over the trial of a civilian named Milligan charged with having, during the Civil War, given aid and comfort to

the enemy and with other disloyal practices, including communication with the enemy, all committed within the State of Indiana and outside of the immediate field of military operations. He was arrested by the military authorities, tried, and sentenced by a military tribunal and was in the custody of the said authorities awaiting execution of the sentence. He filed a habeas corpus petition for release from this custody and attacked the jurisdiction of the military authorities to arrest, try, and sentence him. The Supreme Court held, unmistakably, that as the offense had been committed outside of the field of military operations and by a person not a member of the military or naval forces of the country and in a state or district in which the regular civilian courts were functioning, the trial and conviction of Milligan by a military tribunal was illegal, being in violation of section 2 of Article II and the fourth, fifth, and sixth amendments of the Constitution.

To the plea that public exigency may require the military trial of war crimes, the court replied (4 Wallace, p. 120):

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

The fundamental basis of military jurisdiction over persons not members of the military forces and the consequent limitations of that jurisdiction were fully discussed by the court and summarized in the following passage (4 Wallace, p. 127):

"It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theater of active military operations, where war really prevails, there

is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."

An able discussion of the bases and limitations of the jurisdiction of military tribunals will be found in the case of *Johnson v. Jones*, 44 Illinois 142, where the situation was quite analogous to that of the Milligan case and the court arrived at the same conclusion.

Milligan was a citizen of the United States. But the provisions of the Constitution upon which the decision was based are not limited to citizens; they apply to citizens and aliens alike.

The Milligan decision has been the subject of extensive discussion and attack, and the contention has been made that the discussion of the constitutional questions was not essential to the decision and therefore merely dicta. However, if there were no Milligan case to furnish us with an authoritative precedent, the provisions of the Constitution would themselves plainly bring us to the same conclusions as those set forth in the opinion of the court in that case, namely, that in this country, military tribunals, whether courts-martial or military commissions, can not constitutionally be granted jurisdiction to try persons charged with acts or offences committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces such as camp followers. Were this not the correct conclusion, then any person accused of espionage, for instance, wherever apprehended and wherever the act charged may have been committed, would immediately become subject to the jurisdiction of a military court, and

all the above-cited provisions of the Constitution would be rendered nugatory in the cases of the most grave class of crimes, generally carrying the death penalty. Any other conclusion would be tantamount to applying martial law, where no justification for martial law exists and none had been declared, and would be a suspension of the Constitution during war times.

The Supreme Court when enumerating the constitutional provisions applicable to the case, did not specify section 1 of Article III, which provides that the judicial power of the United States shall be vested "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish." But I believe that that section also precludes the jurisdiction of a military court in such a case as that of Milligan or Waberski. The following passage in the Milligan opinion (4 Wallace, p. 121) shows that the court had this in mind:

"Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of this country was conferred on them; because the Constitution expressly vests it 'in one supreme court and such inferior courts as the Congress may from time to time ordain and establish,' and it is not pretended that the commission was a court ordained and established by Congress. They can not justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is 'no unwritten criminal code to which resort can be had as a source of jurisdiction.'"

In re Vidal, 179 U. S. 126, the Supreme Court held, speaking of military tribunals:

"Nor are such tribunals courts with jurisdiction in law or equity within the meaning of those terms as used in the third article of the Constitution."

The trial of a man charged with crime is a judicial proceeding, the exercise of judicial power. Therefore, it seems plain to me, that Congress can not constitutionally confer jurisdiction upon a military court to try and sentence any man not a member of the military forces and

not subject to the jurisdiction of such court under the laws of war or martial law.

The contention has been put forward, however, that the laws of war deal with the subject of "spies" and that the Constitution should be interpreted as consistent with the well-recognized laws of war and that these justify the trial of Waberski by a military court. However, all authoritative definitions of the word "spy" show that the laws of war are perfectly consistent with the Milligan case as above interpreted. A spy is defined in 2 Winthrop, "Military Law," page 1193, as—

"A person who, without authority and secretly, or under a false pretext, contrives to enter *within the lines of an army* for the purpose of obtaining material information and communicating it to the enemy; or one who, being by authority *within the lines*, attempts secretly to accomplish such purpose."

The Hague Convention of 1917, Respecting the Laws and Customs of War on Land, provided as follows:

"ARTICLE. 29. A person can only be considered a spy when acting clandestinely or on false pretences obtains or endeavors to obtain information *in the zone of operations* of a belligerent with the intention of communicating it to the hostile party."

Obviously Waberski does not fit into these definitions.

The spy dealt with in the laws of war is not engaged in anything criminal, using the word "criminal" in a technical sense. Spying within the lines or zone of military operations of the enemy is one of the recognized modes or incidents of warfare. If caught within the lines, the spy is tried by court-martial and executed, not because he has committed a crime, but, probably, because in this way this method of warfare is made as dangerous and unsafe as possible, and all possibility of the spy's information reaching the enemy is destroyed. That this is the basis of the jurisdiction of the military authorities over the enemy spy is indicated by the fact, that if he escapes and returns to his own lines and is later captured, he may not be tried or punished as a spy, but must be treated as a prisoner of

war. See Hague Convention 1907, Respecting the Laws and Customs of War on Land, article 31, reading:

"A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage."

This shows how inapplicable the principle of the trial and execution of spies is to a case such as that before us; for, if the man who escape from our military lines may not be tried by court-martial as a spy when recaptured, surely then the man who has never gone into our military lines may not be so tried. This distinction between an act of war and a crime is noted by the court in the Milligan decision on the following passage (4 Wallace, p. 131):

"But it is insisted that Milligan was a prisoner of war, and, therefore, excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past 20 years, was arrested there, and had not been, during the late troubles, a resident of any of the States in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offense, he can not plead the rights of war; for he was not engaged in legal acts of hostility against the Government, and only such persons, when captured, are prisoners of war. If he can not enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?"

The laws of war are perfectly consistent with the above-mentioned clauses of the Constitution. There is no conflict between them which requires solution. The one relates to the spy caught in military territory, the other to the men guilty of the crime of espionage outside of such territory.

Congress has recognized this by the passage of the Espionage Act, which provides for the trial and punishment of persons guilty of espionage anywhere in the United States.

Plainly, therefore, Waberski is not a spy in the sense in which that word is used in the laws of war and, if guilty

of any offense, is triable solely by the regular civilian criminal courts. Any interpretation of section 1343 or article 82 of the Articles of War which would authorize his trial by court-martial, would infringe upon the above-quoted provisions of the Federal Constitution. If he could constitutionally be tried by court-martial, then it would logically follow that Congress could provide for the trial by military courts of any person, citizen or alien, accused of espionage or any other type of war crime, no matter where committed and no matter where such person be found and apprehended. It was because I realized that this is where the claim of military jurisdiction over Waberski would logically lead, that I felt it necessary to call your attention to the case even before it came to you in the regular course.

My conclusion that the section 1343 of the Revised Statutes and the 82d Article of War can not constitutionally be applied to the Waberski case, renders it unnecessary to further discuss the meaning of the words "or elsewhere" in those statutes.

Faithfully yours,

T. W. GREGORY.

TO THE PRESIDENT.

GOVERNMENT CONTROLLED RAILROADS—ASSIGNMENT
OR PROSECUTION OF ACTION.

Neither the taking over and the operation of the railroads by the Government nor the order of the Director General of Railroads requiring that an action to recover damages against a Government controlled railroad be brought directly against the said Director General of Railroads has deprived the United States Employees' Compensation Commission of the power to require a beneficiary to assign his right of action to the United States or prosecute said action as a condition to settlement.

DEPARTMENT OF JUSTICE,

December 18, 1918.

SIR: I have the honor to acknowledge receipt of your letter of November 27, requesting an opinion on a question submitted by the chairman of the United States Employees' Compensation Commission.

The question is whether it is the duty of the commission to require claimants to either (1) assign to the United States the right to recover damages for injuries for which compensation is claimed or (2) to prosecute in their own names actions thereon when the claimant is a railway mail clerk and the party liable for damages is a railroad company under the control of the United States Railroad Administration.

Sections 26 and 27 of the act creating the commission (39 Stat. 747) provide if the injury or death for which compensation is claimed "is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor," the commission may, as a condition to the settlement, require that the right of action be either assigned to the United States or that the claimant prosecute a suit thereon. In either event, the amount recovered is to be first applied to reimbursing the employees' compensation fund for all payments made or to be made.

The manifest spirit of the act is that the commission shall compensate for injuries only to the extent that compensation is not received from other sources.

The present inquiry arises from the fact that the railroads are now in the control of the United States and the operating expenses are paid not by the companies, but by the United States. Whether a suit to recover for damages be brought against a Government controlled railroad, as provided in the railroad control act, or against the Director General of Railroads, as provided in his recent order, the judgment must ultimately be paid by the United States. Since the authority to require an assignment or suit exists only when a legal liability to pay damages rests "*upon some person other than the United States*," a literal construction of the act might lead to the conclusion that when the ultimate liability to pay damages rests upon the United States itself there is no authority to require an assignment or suit. But in view of the obvious purpose to provide compensation only to the extent that it is not obtained from other sources, I do not think the act can properly be so

construed. Certainly it could not have been contemplated that the Government should receive credit for whatever compensation should be paid by a third party and yet should in any case be denied a like credit in a case in which similar liability for damages should rest upon it.

I am therefore of opinion that neither the taking over and operation of the railroads by the Government nor the recent order of the Director General of Railroads has deprived the commission of the power to require an assignment or suit. An assignment to the United States would probably extinguish the right of action, and it should be required for that if for no other reason. It may be that in case of liability the compensation should be paid by the Railroad Administration instead of by the commission, but this is a matter of adjustment between two departments of the same Government; or it may be considered by the commission in determining whether it will require an assignment or the prosecution of a suit as a condition to settlement.

Respectfully,

T. W. GREGORY.

To the PRESIDENT.

APPOINTMENT OF OFFICERS IN VETERINARY CORPS.

The Selective Service Act of May 18, 1917 (40 Stat. 76), authorizes the President to appoint officers of the grades of colonel and lieutenant colonel in the Veterinary Corps, United States Army.

DEPARTMENT OF JUSTICE,

January 3, 1919.

SIR: I beg to acknowledge your letter of November 21, 1918, informing me of a recent decision of the Comptroller of the Treasury, in which that officer, basing his opinion upon the provisions of section 16 of the National Defense Act (act of June 3, 1916, 39 Stat. 176), ruled that, in the organization of the Veterinary Corps of the United States Army, no grades may be created higher than those prescribed specifically for the organization of that corps in the permanent establishment, that is, that appointments above the grade of captain can not lawfully be made. You

also stated that the Judge Advocate General has held that the Selective Service Act (act of May 18, 1917, 40 Stat. 76), authorizes the President to appoint officers of higher grades than those specified for the Veterinary Corps of the Regular Army; and, admittedly, there is no other existing statute from which the said authority can be derived. You request my opinion on the question whether this act of May 18, 1917, does authorize the President to appoint officers of the grades of colonel and lieutenant colonel in the Veterinary Corps, United States Army.

The "United States Army" referred to is evidently the combined land forces of the United States into which all such forces, whether members of the Regular Army, federalized National Guard, National Army or other subdivision, were merged and intermingled by virtue of General Order No. 73, War Department, August 7, 1918.

Section 1 of the Selective Service Act provided for the increase of the military forces: Firstly, as provided in the first paragraph, by bringing the Regular Army to the maximum strength authorized by law; secondly, as provided in the second paragraph, by drafting the National Guard into the Federal service; and, thirdly, as provided in the third and fourth paragraphs, by the creation of two additional forces of 500,000 enlisted men each, to be raised by draft. These additional forces came to be known as the "National Army." The fifth, sixth, and seventh paragraphs provide for additional recruit training units, ammunition batteries and battalions, depot batteries and battalions, artillery parks, and four volunteer infantry divisions.

Each of these paragraphs contained express provisions for the appointment of officers for the forces thereby respectively created. For the Regular Army, the first paragraph authorized temporary appointments "for the period of the emergency," in addition to the permanent and provisional appointments authorized by the National Defense Act. For the federalized National Guard, the second paragraph authorized the appointment of officers "in accordance with the provisions of section one hundred and

eleven of the National Defense Act, so far as the provisions of said section may be applicable and not inconsistent with the terms of this (Selective Service) Act."

The third paragraph, dealing with the first 500,000 of the "National Army" authorized the President to "provide the necessary officers, line and staff," for the forces therein created. The only limitation as to grades of officers is the provision reading:

"That officers with rank not above that of colonel shall be appointed by the President alone, and officers above that grade by the President by and with the advice and consent of the Senate" (40 Stat. 77).

The remaining paragraphs of this section 1 adopt, by reference, the said provisions of the third paragraph. The later statutes supplementing the Selective Service Act by enlarging the draft ages and authorizing additional forces contain no provisions concerning the appointment of officers. The provisions of the said third paragraph, therefore, apply to all the new forces raised under the Selective Service Act and acts supplementary thereto, except the Regular Army and federalized National Guard.

Section 2 of the Selective Service Act contains the following clause:

"All persons drafted into the service of the United States and all officers accepting commissions in the forces herein provided for shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the Regular Army, except as to promotions, so far as such laws and regulations are applicable to persons whose permanent retention in the military service on the active or retired list is not contemplated by existing law, and those drafted shall be required to serve for the period of the existing emergency unless sooner discharged."

Section 8 of the Selective Service Act expressly provides:

"That the President, by and with the advice and consent of the Senate, is authorized to appoint for the period of the existing emergency such general officers of appropriate grades as may be necessary for duty with brigades, divi-

sions and higher units in which the forces provided for herein may be organized by the President, and general officers of appropriate grade for the several Coast Artillery districts. In so far as such appointments may be made from any of the forces herein provided for, the appointees may be selected irrespective of the grades held by them in such forces. Vacancies in all grades in the Regular Army resulting from the appointment of officers thereof to higher grades in the forces other than the Regular Army herein provided for shall be filled by temporary promotions and appointments in the manner prescribed for filling temporary vacancies by section one hundred and fourteen of the national defense act approved June third, nineteen hundred and sixteen; and officers appointed under the provisions of this Act to higher grades in the forces other than the Regular Army herein provided for shall not vacate their permanent commissions nor be prejudiced in their relative or lineal standing in the Regular Army."

Section 9 of the Act provides:

"That the appointments authorized and made as provided by the second, third, fourth, fifth, sixth, and seventh paragraphs of section one and by section 8 of this Act, and the temporary appointments in the Regular Army authorized by the first paragraph of section one of this Act, shall be for the period of the emergency, unless sooner terminated by discharge or otherwise."

The above provisions of the Selective Service Act constitute all which are pertinent or applicable to the question under discussion. They clearly warrant the conclusion that this statute empowered the President to appoint for "the period of the emergency," without limitations as to grades, all officers deemed by him to be necessary for the armed forces authorized by the Act. The Act contains no express limitations whatever upon the grades of officers to be appointed thereunder, unless such limitations are contained in the references to the National Defense Act in the first and second paragraphs of section 1. The proviso in the third paragraph of section 1, "that officers with rank not above that of colonel shall be appointed by the Presi-

dent alone, and officers above that grade by the President by and with the advice and consent of the Senate," impliedly, at least, recognizes the possibility of the use of the grade of colonel as well as higher and lower grades.

Section 111 of the National Defense Act (being the section referred to in the second paragraph of section 1 of the Selective Service Act) contains no limitations upon the grades of officers; and the clause therein contained reading, "the commissioned officers of said organizations shall be appointed from among the members thereof, officers with rank not above that of colonel to be appointed by the President alone, and all other officers to be appointed by the President by and with the advice and consent of the Senate," plainly recognizes the power to use the grade of colonel as well as higher and lower grades.

Section 16 of the National Defense Act contains the only provisions in either statute expressly relating to veterinarians or the Veterinary Corps. That section applies exclusively to the Regular Army; and assuming it to be included in the references contained in the first paragraph of section 1 of the Selective Service Act, the limitations which it places upon the grades of officers of the Veterinary Corps would, therefore, apply exclusively to the Regular Army. Reading the two statutes together and, in accordance with the well-known principle of statutory interpretation, reconciling and harmonizing their provisions, I deem it furthermore plain that these limitations apply only to customary permanent commissions in the Regular Army and not to the temporary commissions "for the period of the emergency" authorized by the Selective Service Act. This conclusion is clearly supported by the provision in the second section of the later statute that "all officers accepting commissions in the forces herein provided for shall, from the date of said acceptance, be subject to the laws and regulations governing the Regular Army, except as to promotions, so far as such laws and regulations are applicable to persons whose permanent retention in the military service on the active or retired list is not contemplated by existing law," and the provision in the ninth section that "the temporary appointments in

the Regular Army authorized by the first paragraph of section 1 of this Act shall be for the period of the emergency." In short, the language of the later statute consistently provides for the appointment, "for the period of the emergency," of officers for all the new forces, including temporary officers of the Regular Army, without limitations as to grades.

The War Department's General Order No. 73 of August 7, 1918, merging the Regular Army, National Guard, National Army, and other forces into one "United States Army", is simply an administrative and operating arrangement. It does not effect any change in the statutory basis of the appointment of any officer nor in his statutory privileges or obligations. For instance, a permanent commissioned officer of the Regular Army would remain subject to the laws relating to such officers, even though, in the actual conduct of military operations, the Regular Army is, by virtue of said order, treated as merged into the United States Army. Similarly an appointment to the United States Army which, by virtue of its tenure or other characteristics, plainly falls within the description of officers of the Regular Army as set forth in the National Defense Act, would be subject to the provisions of that Act relating to the Regular Army, even though, by virtue of said order, the Regular Army is treated for the time being as merged into the United States Army and the appointment contains no mention of "Regular Army".

As, however, those provisions of the Selective Service Act which expressly or impliedly relate to the grades of officers appointed for "the period of the emergency," make no distinction between the temporary commissions in the Regular Army and commissions in the federalized National Guard, National Army, and the other new or enlarged armies created by that Act, it follows that, so far as the question under discussion is concerned, there would be no necessity for deciding whether an officer appointed to the United States Army "for the period of the emergency" is to be treated as belonging to the Regular Army, federalized National Guard, National Army, or other subdivision. The

said order No. 73, so far as the question before us is concerned, has no effect whatever.

I am, therefore, of the opinion that there is no statutory limitation upon the grades of officers appointed "for the period of the emergency" for the enlarged or new military forces authorized by the selective service act, its amendments and supplements; except, of course, such limitations as may be applicable to all appointments of military officers and the requirement of the Senate's consent to appointments above the grade of colonel. This applies to veterinarians or to the Veterinary Corps, as well as any other portion of these armies, as the Selective Service Act makes no distinctions in this regard between different classes of service. Appointments to the United States Army, which by virtue of their permanence of tenure or other characteristics, fall within the description of appointments to the Regular Army as contained in the National Defense Act, would be subject to the applicable provisions of that act and, in the case of an appointment to the Veterinary Corps, therefore, would be subject to the limitations set forth in section 16 of that Act. With this exception, the Act of May 18, 1917, authorizes the President to appoint officers of the grades of colonel and lieutenant colonel in the Veterinary Corps, United States Army.

Respectively,

G. CARROLL TODD,
Acting Attorney General.

To the SECRETARY OF WAR.

PORTO RICO—LEGALITY OF BOND ISSUE.

The proposed issue of bonds by Porto Rico to the amount of \$200,000 for the improvement of the irrigation system, as authorized by act No. 23 of the Legislature of Porto Rico of November 22, 1917, not being in excess of 7 per centum of the aggregate tax valuation of the property of Porto Rico, as required by section 3 of its organic act of March 2, 1917 (39 Stat. 953), the bonds will, if issued under the conditions prescribed by the said act of Porto Rico of November 22, 1917, be valid and binding obligations upon the people of Porto Rico.

DEPARTMENT OF JUSTICE,
January 8, 1919.

SIR: I have the honor to acknowledge receipt of your letter of December 21, 1918, requesting my opinion as to the legality of a proposed issue of bonds of the people of Porto Rico to the amount of \$200,000, for the improvement of the irrigation system and for other purposes, the said issue being authorized by act No. 23 of the legislature of Porto Rico, approved November 22, 1917.

General authority to issue bonds in anticipation of taxes and revenues is granted the people of Porto Rico by section 3 of the present organic act, approved March 2, 1917 (39 Stat. 953), subject to the proviso that no public indebtedness of Porto Rico shall be authorized or allowed in excess of 7 per centum of the aggregate tax valuation of its property. In an opinion rendered by me August 19, 1918 (31 Op. 342), I pointed out that the provisions of said section 3 were identical with those contained in section 38 of the previous organic act, approved April 12, 1900, and that the authority to issue bonds by virtue of section 38 had been favorably passed upon by my predecessors (27 Op. 104; 28 ib. 245; 29 ib. 497, 577), and by me (opinion rendered Aug. 10, 1916).

It appears from your letter of December 21, 1918, and is confirmed by the affidavit of the treasurer of Porto Rico, that the proposed issue will not cause the public indebtedness of Porto Rico to exceed 7 per centum of the aggregate tax valuation of its property.

The bond issue is for the purpose of providing funds for the extension and improvement of a system already put into operation by the government of Porto Rico by which provision is made for irrigation and surplus water therein impounded is utilized for the production of hydroelectric power. An act of the legislative assembly of Porto Rico approved September 18, 1908, and known as the public irrigation law, authorized the construction of this system. Section 29 of that act authorized the utilization and exploitation of surplus water power developed in connection

with the construction of the irrigation system. A second act of the legislative assembly of Porto Rico, also approved September 18, 1908, permitted the issue of bonds to provide funds for the construction authorized in the public irrigation law. The validity of this bond issue was sustained in a carefully reasoned opinion by Attorney General Bonaparte (27 Op. 104). While this opinion, which declared that irrigation is a public purpose for which funds might be raised by taxation, did not advert to the provisions for the utilization of surplus water power, it must be assumed that this feature was considered in passing upon the validity of the bond issue. In any case, no serious question is raised by it. The circuit court of appeals for the ninth circuit has held that a power plant furnishing electricity to the public can exercise the right of eminent domain because it is serving a public use. *Walker v. Shasta Power Co.* (160 Fed. 856) and a large number of State courts have taken the same view. Apart from the fact that the public moneys of Porto Rico have long since been spent in the construction and maintenance of such a power plant without the question of the validity of such action being raised, I think it clear that the extension under these circumstances of a plant to supply electric power for agricultural and other purposes serves a public purpose.

You inclose a certified copy of a letter from the treasurer of Porto Rico to the government of Porto Rico, under date of March 19, 1918, duly approved by the governor of Porto Rico, setting forth the terms, date, denominations, etc., of the bonds. The conditions therein prescribed for these bonds have been compared with the governing sections of the act of the legislature approved November 22, 1917. You are advised that the bonds if issued under the conditions so prescribed will, in my opinion, be valid and binding obligations upon the people of Porto Rico.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF WAR.

SUGAR REFINERS' AGREEMENT WITH FOOD ADMINISTRATION.

A certain agreement negotiated by the United States Food Administration with the leading refiners of sugar in the United States which provides that until December 31, 1919, the refiners shall purchase their entire requirements of raw sugar from the United States Sugar Equalization Board, Inc. (an agency of the Food Administration), and that during such period the refiners shall observe a fixed maximum price on all sugar manufactured by them, is authorized by the Food Control Act and is not prohibited by the Sherman Antitrust Act.

DEPARTMENT OF JUSTICE,

January 9, 1919.

SIRS: I have your letter of December 23, 1918, requesting my opinion upon the question whether a certain agreement negotiated by the United States Food Administration with the leading refiners of sugar in the United States, and providing in substance that until December 31, 1919, the refiners shall purchase their entire requirements of raw sugar from the United States Sugar Equalization Board, Inc. (an agency of the Food Administration), and that during such period the refiners shall observe a fixed maximum price on all sugar manufactured by them, is in violation of any law of the United States and particularly the Sherman Antitrust Act (26 Stat. 209).

1. In a letter to the President dated August 23, 1917, the Attorney General considered generally the authority of the United States Food Administrator, under the so-called Food Control Act (40 Stat. 276), to enter into agreements with persons in the various trades and industries which would have the effect of fixing prices or pooling output—in short, agreements which if made between private traders would violate the Sherman Act. On that occasion the Attorney General expressed the view, to which I now adhere, that such agreements are authorized provided they have a reasonable relation to the objects of the Food Control Act as expressed in section 1.

The Attorney General said:

“I am of the opinion that any agreement made with producers or traders *by the Government itself* (through the

Food Administrator acting by direction of the President), under authority of section 2 of the Act, and having a reasonable relation to the objects enumerated in section 1, for example, to assure an adequate supply and equitable distribution of necessities and to establish and maintain governmental control of necessities during the war, would not fall within the operation of the Sherman antitrust law, even though the effect of the agreement or agreements were to fix a uniform price or to accomplish a pooling of output. This, because *governmental action* with respect to prices or methods of distribution is obviously not within the mischief at which the Sherman law was aimed. On the contrary, when natural laws of trade break down, governmental action in this regard may become essential to prevent the private control of markets. For, when natural laws of trade can no longer be depended upon to regulate markets, the only choice is between artificial control imposed by private interests and artificial control imposed by public agencies. In these circumstances, therefore, such governmental action, so far from running counter to the purpose of the Sherman law, is directly in line with it." (*Italics in original.*)

The validity of such an agreement, therefore, depends not upon whether it may be said to constitute a violation of the Sherman Act, but upon whether it bears a reasonable relation to the declared objects of the Food Control Act. Let the agreement be one with the Government through a duly authorized agency, let it have a reasonable relation to the declared objects of the Food Control Act, and it is at once removed from the purpose and operation of the Sherman Act and other statutes governing restraints of trade by private persons.

2. So far as germane to the present inquiry, the objects of the Food Control Act as declared in section 1 are:

"To assure an adequate supply and equitable distribution * * * of foods, feeds, and fuel * * * hereafter in this Act called necessities;

"To prevent, locally or generally, scarcity * * * affecting such supply * * *; and

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"To establish and maintain governmental control of such necessities during the war."

And the same section further declares that it was to carry into effect these objects that the "powers * * * hereinafter set forth are * * * conferred".

The section concludes with a broad grant of authority to the President "to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act". Not content with this general authority, however, section 2 specifically provides that in carrying out the objects of the act (those declared in section 1, amongst others)—

"the President is authorized to enter into any voluntary arrangements or agreements, to create and use any agency or agencies, * * * to cooperate with any agency or person, to utilize any department or agency of the Government * * *."

Section 19 provides:

"That for the purposes of this act the sum of \$150,000,000 is hereby appropriated * * *."

It is apparent that under these several provisions the President has power through such appropriate agencies as he may choose to enter into agreements with producers or traders having a reasonable relation to the ends (1) of assuring an adequate supply of necessities; (2) of assuring an equitable distribution thereof; (3) of preventing scarcity thereof; and (4) of establishing and maintaining Government control thereof during the war.

Does the present agreement come within this description? The agreement was negotiated under the following circumstances as gathered from your letter and the data submitted therewith:

Confronted with a threatened shortage in the sugar supply for the crop year 1918-19, the President, acting through the Food Administration, deemed it expedient to stimulate the production of sugar beets and sugar cane in this country by assuring to the producers a stable, certain, and remunerative price.

An exhaustive investigation of the cost per ton of producing sugar beets having disclosed that \$10 per ton was

a fair price therefor in view of all the circumstances, the President, acting as aforesaid, urged the beet sugar refiners to enter into contracts with the farmers for beets on that basis, which they did.

Later the President entered into voluntary agreements with the Louisiana cane sugar producers (who for the most part refine their own sugar) and the manufacturers of beet sugar, fixing the price of refined domestic sugar for the crop year 1918-19 at 9 cents per pound wholesale, which, after thorough investigation, was found to be a fair price in view of the increased cost and the necessity for stimulating production.

To protect the price thus established for domestic sugar it was necessary to provide a means of handling the Cuban sugar which is the main reservoir from which the supply of the United States is drawn. Accordingly the President, under the authority vested in him by the Food Control Act to "create and use any agency or agencies," caused to be organized the United States Sugar Equalization Board (Inc.) and subscribed for its entire capital stock in the name of the United States.

Thereafter, on October 24, 1918, the Equalization Board entered into an agreement with a commission appointed by the President of the Republic of Cuba and with the agents of the Cuban producers by the terms of which the Equalization Board obligates itself to purchase and the parties of the second part obligate themselves to furnish and sell the entire Cuban crop of raw sugar for the year 1918-19 at prices therein set forth.

There has now been negotiated the agreement in question, also dated October 24, 1918, between the Equalization Board, Herbert Hoover, United States Food Administrator, and the leading refiners of sugar of the United States (other than the refiners of domestic cane and beet sugars), the pertinent provisions of which may be summarized as follows:

(a) The refiners agree that during the period from October 1, 1918, to December 31, 1919, they will purchase their entire requirements of raw sugar of all kinds from the Equalization Board.

(b) The Equalization Board in turn agrees to furnish and sell to the refiners their entire requirements of raw sugar during the period in question at 7.28 cents per pound.

(c) While the agreement relates principally to Cuban sugar, the main source of supply, the refiners agree to accept at the same price any other sugars which the Equalization Board may provide for their requirements.

(d) The sugars provided by the Equalization Board are to be distributed among the refiners in stated proportions set forth in Exhibit B to the agreement.

(e) The refiners agree that they will not charge more than 1.54 cents net per pound for their refining margin.

The effect of this agreement is to stabilize the price of sugar refined from Cuban raw sugar at the same price agreed upon with the Louisiana cane sugar producers and the manufacturers of beet sugar, to wit, 9 cents per pound wholesale. Between the price paid for the Cuban raw sugar and the price at which it is sold by the Equalization Board, there is a margin of profit of from 25 to 38 cents per 100 pounds, which, after discharging the liabilities of the Equalization Board, will be turned into the Treasury of the United States as miscellaneous receipts.

The immediate purpose of the agreement was thus to give effect to a plan formulated by the Food Administration to assure an adequate supply and prevent scarcity of a necessary of life—one of the principal objects of the Food Control Act as declared in section 1. I have no difficulty in saying that in my opinion the agreement bears a clear and substantial relation to that object and also to the further object expressed in section 1 of establishing and maintaining governmental control of necessities during the war; and that therefore it is authorized by the Food Control Act and is not prohibited by the Sherman Act.

Respectfully,

T. W. GREGORY.

To the UNITED STATES FOOD ADMINISTRATION.

PORTO RICO—TERM OF OFFICE OF CERTAIN OFFICIALS.

Section 52 of the organic act of Porto Rico of March 2, 1917 (39 Stat. 967), did not have the effect of reappointing the present attorney general, commissioner of education, and auditor of Porto Rico to a new term of office, but these officials are continued in office under their original appointments.

DEPARTMENT OF JUSTICE,
February 3, 1919.

SIR: I have the honor to reply to your letter of December 18, 1918, in which you state that a question has arisen as to the duration of the term of office of the present attorney general, commissioner of education, and auditor of Porto Rico. All of the officials hold appointment under section 18 of the former organic act of Porto Rico, approved April 12, 1900 (31 Stat. 81), the pertinent part of which provides:

"That there shall be appointed by the President, by and with the advice and consent of the Senate, for a period of four years, unless sooner removed by the President, a secretary, an attorney general, a treasurer, an auditor, a commissioner of the interior, and a commissioner of education * * *."

Section 52 of the present organic act, approved March 2, 1917 (39 Stat. 967), provides:

"That wherever in this Act offices of the insular government of Porto Rico are provided for under the same names as in the heretofore existing Acts of Congress affecting Porto Rico, the present incumbents of those offices shall continue in office in accordance with the terms and at the salaries prescribed by this Act * * *."

Section 13 of the Act of March 2, 1917, p. 955, makes provision for the offices of attorney general and commissioner of education as follows:

"The attorney general and commissioner of education shall be appointed by the President, by and with the consent of the Senate of the United States, to hold office for four years and until their successors are appointed and qualified, unless sooner removed by the President."

Section 20 of the same Act, p. 957, deals with the auditor for the island as follows:

"That there shall be appointed by the President an auditor, at an annual salary of \$5,000, for a term of four years and until his successor is appointed and qualified
* * *"

The present organic act fixes the term of office for the attorney general, commissioner of education, and auditor as four years from the date of their appointment by the President and until their successors are appointed and qualified. Section 52 of the act can not have the effect of reappointing present incumbents to a new term of office, since the incumbents would then hold office four years from March 2, 1917, and not four years after appointment by the President, in accordance with the terms prescribed by the new organic act.

I agree with the opinion expressed by the Acting Judge Advocate General of the Army that section 52 of the new organic act did not have the effect of reappointing the officials for a new term, but that they are continued in office under their original appointments and that upon the expiration of their present term of office, in the normal course of events new appointments should be made.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF WAR.

WAR RISK INSURANCE ACT—CONVERSION OF TERM INSURANCE.

The Bureau of War Risk Insurance may, without awaiting the formal termination of the war as declared by proclamation of the President of the United States, convert war-time term insurance heretofore granted under the provisions of the War Risk Insurance Act into other forms of insurance authorized by said Act.

DEPARTMENT OF JUSTICE,

February 4, 1919.

SIR: I have the honor to acknowledge receipt of your letter of January 31, 1919, requesting an opinion "as to whether the Bureau of War Risk Insurance may now—that is to say, after the cessation of hostilities—convert the

war-time term insurance heretofore granted under the provisions of the War Risk Insurance Act into other forms of insurance authorized by the Act, without awaiting the formal termination of the war as declared by proclamation of the President of the United States." The question calls for an interpretation of section 404 of the War Risk Insurance Act (40 Stat. 410), which is as follows:

"That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election."

I have no difficulty in reaching the conclusion that the signing of the armistice and the consequent cessation of hostilities did not bring to an end "the period of war" within the meaning of the Act. It can not, in my opinion, be said that the parties are no longer belligerents, nor that a condition of war does not exist between them, nor that they are not in a state of war. "The period of war" will continue until the ratification of a treaty of peace or until the termination of the war shall have been proclaimed by the President. (Bouvier's Law Dictionary, pp. 238, 3419; 40 Cyc. p. 303; *Prize Cases*, 67 U. S. 635; *Hijo v. United States*, 194 U. S. 315.) The question then is whether the language of the Act postpones the right to convert until the termination of "the period of war."

It is first provided that "during the period of war and thereafter until converted the insurance shall be term insurance." It is then provided that the insurance shall be

converted "not later than five years after the date of the termination of the war." Obviously, the Government must furnish the soldier term insurance during the period of the war and during the further period of five years thereafter unless he sooner elects to convert it. The word "thereafter" in the first sentence of section 404 of course refers to this period of five years, and the full meaning of that sentence as defined by the next sentence may be expressed thus:

"That during the period of war and for five years thereafter until converted the insurance shall be term insurance."

One continuous period is dealt with. It consists of a fixed period of five years plus the indefinite period of the war. The term insurance is to be carried during the entire period or until converted at the option of the soldier. The words "until converted" modify the insurance which is to be carried, and the meaning will perhaps be clearer if they are transposed so that the sentence will read:

"That during the period of war and thereafter (for five years) the insurance until (unless) converted shall be term insurance."

Read in this way the result is that the soldier has the right to term insurance for the duration of the war and for five years thereafter, with the additional right to convert it at any time during the same period.

I am therefore of opinion that the term insurance heretofore issued may now, at the option of the insured, be converted, not because the armistice terminated the period of the war, but because the right to convert exists during as well as after that period.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE TREASURY.

ORGANIZATION OF NATIONAL BANK AT COLLEGE POINT,
N. Y.

A national bank can not be organized at College Point, Borough of Queens, N. Y., with a capital of \$100,000 consistently with the provisions of section 5138 of the Revised Statutes.

DEPARTMENT OF JUSTICE,

February 17, 1919.

SIR: I have the honor to acknowledge receipt of your letter of February 10, 1919, requesting an opinion as to whether a national bank may be organized at College Point, Borough of Queens, N. Y., with a capital of \$100,000.

College Point is a settlement of about 15,000 people situated upon a point of land jutting into Long Island Sound. It is about $9\frac{1}{4}$ miles from the Borough of Manhattan, to which transportation facilities are very poor. In a sense it is an independent business center. But it is a part of the Borough of Queens, city of Greater New York, and it has no separate legal existence.

Section 5138 of the Revised Statutes, as amended (31 Stat. 48), is as follows:

"No association shall be organized with a less capital than one hundred thousand dollars, except that banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants, and except that banks with a capital of not less than twenty-five thousand dollars, may with the sanction of the Secretary of the Treasury, be organized in any place the population of which does not exceed three thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than two hundred thousand dollars."

My predecessor held (30 Op. 173) that a "place," within the meaning of this section, is a city, town, or village with a corporate or quasi-corporate organization for the purpose of self-government within a definite territory. While it was recognized both in that opinion and in my opinion of June 5, 1917 (31 Op. 120), that exceptional circumstances may warrant some extension of this definition, there is here a further difficulty. In the latter opinion I pointed out that what was called "the city and county of Honolulu"

was not, for reasons which I gave, a city within the meaning of the last sentence of section 5138. Here the case is otherwise.

The city of Greater New York is undoubtedly such a city. Despite its isolation, College Point is a part thereof. It has no powers of self-government. The Borough of Queens has slight powers of this character, but that Borough itself has a population exceeding 50,000. I am of opinion that the proposed charter can not issue.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE TREASURY.

OPINIONS
OF
HON. A. MITCHELL PALMER, OF PENNSYLVANIA.
APPOINTED MARCH 5, 1919.

**PAYMENT OF COMMUTED VALUE OF POLICY TO INSURED'S
ESTATE UNDER WAR-RISK INSURANCE ACT.**

Inclusion in the converted insurance policies proposed to be issued under the War-Risk Insurance Act of a provision that the commuted value of the policy shall be payable to the estate of the insured, in the event of the failure of any person within the permitted classes to survive the insured, or in the event of the exhaustion by death of all persons within those classes before the payment of the full number of installments provided for, is authorized by the law and will be valid.

DEPARTMENT OF JUSTICE,
March 14, 1919.

SIR: I have the honor to acknowledge receipt of your letter of March 8, requesting an opinion as to the validity of a certain provision of the 20-payment life insurance policy proposed to be issued under the War-Risk Insurance Act, copy of which policy you submit.

This policy provides for the payment upon the death of the insured of the amount of the policy in 240 monthly installments to the designated beneficiary or beneficiaries who shall be within the class permitted by the War-Risk Insurance Act or any supplement thereto. It is then provided that if no such beneficiary is designated by the insured either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the insured, or if such beneficiary survives but dies before receiving all the installments, the insurance, or the unpaid part thereof, shall be payable to such person or persons within the permitted class of beneficiaries as would, under the laws

of the State of residence of the insured, be entitled to his personal property in case of intestacy. There is then inserted the provision as to the validity of which you request an opinion as follows:

"If no such person survive the insured, then there shall be paid to the estate of the insured an amount equal to the commuted value of the monthly installments calculated on the basis of interest at three and one-half per centum per annum less any indebtedness hereon. If after maturity of this policy by death the permitted class of beneficiaries is exhausted before all payments on this insurance have been made, the commuted value of the installments remaining to be paid shall be payable to the estate of the insured."

It will be observed that this paragraph makes the commuted value of the policy payable to the estate of the insured in two contingencies: (1) If no person within the permitted classes of beneficiaries survives the insured; and (2) if persons of that class do survive but all die before the installments are fully paid.

The provisions of the War-Risk Insurance Act prescribing the character of insurance which is authorized are contained in Article IV, sections 402 and 404. Section 402 authorizes and directs the Secretary of the Treasury to promptly determine upon and publish the full and exact terms and conditions of the contract of insurance, provided, however, that the insurance, upon the death of the insured, shall be payable only to a spouse, child, grandchild, parent, brother, or sister. Other details are dealt with and the section concludes as follows:

"If no such person survive the insured, then there shall be paid to the estate of the insured an amount equal to the reserve value, if any, of the insurance at the time of his death, calculated on the basis of the American Experience Table of Mortality and three and one-half per centum interest in full of all obligations under the contract of insurance." (40 Stat. 410.)

This provides for the payment of the *reserve value* in only one contingency, namely, the death of the insured without any person within the class of permitted benefi-

ciaries surviving. If any such person does survive the insured, the obligation to pay the full amount of the insurance undoubtedly accrues. If all such persons die before the insurance is fully paid, section 402 does not undertake to determine to whom the remainder shall be paid. There can be no doubt, however, that it will be an obligation of the United States. Unless otherwise controlled by a valid provision of the policy, it will be payable to the estate of the beneficiary to whom it accrues.

The Act, taken as a whole, plainly provides for two classes of insurance. One is to be temporary insurance, intended as a protection to those who may be supposed to be dependent, wholly or in part, upon members of their family engaged in active military service.

Section 403 provides that the United States shall bear the expenses of administration and the excess mortality and disability cost resulting from the hazards of war, and the manifest purpose is to provide at very low rates insurance during the period of the war. But, evidently as a reward for military service in time of war, Congress coupled with the right to carry temporarily this cheap insurance the right to convert it into other kinds of insurance. Accordingly, section 404 was added as follows:

“That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election.” (40 Stat. 410.)

The form of policy submitted is one of the forms of insurance into which it is proposed to convert the term insurance heretofore issued. The precise question is whether the fact that section 402 does not expressly provide that, in any event, anything more than the *reserve value* of the policy shall be paid to the estate of the insured precludes authority to insert in the converted policy a provision making the *commuted value* of the insurance payable to the estate of the insured. This, as has been seen, it is proposed to do in two contingencies. In the case of a beneficiary or beneficiaries within the permitted classes surviving the insured, as stated above, the obligation of the United States to pay the full amount of the insurance accrues even in the case of the temporary insurance, and section 402 does not undertake to direct to whom any unpaid part of it shall go in the event of the death of the beneficiary. The result is that the Secretary of the Treasury was left free, in determining upon "the full and exact terms and conditions of such contract," to provide for the disposition of the unpaid part of the insurance in this contingency. I am of opinion, therefore, that he could lawfully have put into the policy of temporary insurance the last sentence of the paragraph quoted above from the proposed policy, and there can be no doubt about his right to insert this in the converted policy.

The only remaining question is whether he is now authorized to insert in the converted policy a provision making payable to the estate of the insured the *commuted value* of the insurance in the event no beneficiary within the permitted classes survives the insured when, under section 402, the policy of temporary insurance was required to provide that, in that event, only the *reserve value* of the policy should be paid.

The right to convert this temporary insurance is given in very broad terms. It is to be converted into such form or forms of insurance as may be prescribed by regulations and as the insured may request. And it is required that these regulations shall be such as to enable the insured to convert his insurance "into ordinary life, twenty-payment life, endowment maturing at age sixty-two and into other

usual forms of insurance." An ordinary life or twenty-payment life policy which provided, in any event, for the payment, upon the death of the insured, of only the *reserve value* of the policy would not be one of the usual forms of insurance. Indeed, a policy of any kind which limited the amount to be paid upon the death of the insured to the *reserve value* of the policy would not be a usual form of insurance. There might be good reason for so limiting the amount payable in the case of the temporary insurance issued at very low rates and for the special purpose of protecting certain classes of beneficiaries. It might very well be said that the insured got the full value of the premiums paid as long as the beneficiaries of this class were protected. But the policies containing this provision were not usual forms of insurance. And Congress has plainly manifested an intention that this unusual form of insurance, after the passing of the exigency in which they were issued, should be converted into some of the usual forms of insurance.

I am therefore of opinion that, in the event of the failure of any person within the permitted classes to survive the insured, or in the event of the exhaustion by death of all persons within those classes before the payment of the full number of installments provided for, there is ample authority to make the amount then and thereafter payable under the policy payable to the estate of the insured. This being true, there can be no legal objection to commuting future payments and discharging the obligation of the United States by paying the commuted value.

For the reasons stated, I am of opinion that the proposed provisions of the policy as to which my opinion is asked are authorized by the law and will be valid.

Respectfully,

G. CARROLL TODD,
Acting Attorney General.

To the SECRETARY OF THE TREASURY.

DISPOSITION OF DISTILLED SPIRITS AND WINES
ILLEGALLY IMPORTED.

Spirits brought into the United States in violation of certain acts of Congress herein cited (sec. 15 of the Food Control Act of Aug. 10, 1917, 40 Stat. 282; sec. 301 of the War Revenue Act of Oct. 3, 1917, 40 Stat. 308; and sec. 1 of the Act of Nov. 21, 1918, 40 Stat. 1047) may be seized and forfeited under section 3082 of the Revised Statutes.

When the value of such illegally imported spirits is not in excess of \$500, they may be forfeited and sold by the summary proceedings provided for in sections 3074 to 3077 of the Revised Statutes.

Liquor brought into the United States in violation of the acts mentioned, *supra*, can not ordinarily be permitted to be exported; but where the importer brought in such liquor in good faith and in ignorance of such legislation, having immediately before making the shipments made inquiry of the United States consuls at foreign ports and being informed that there was no law prohibiting the importation thereof, such liquor may be permitted to be exported.

When liquors are forfeited to the United States in a State where the sale of intoxicating liquors is prohibited by State laws, the sale of such liquors by the United States in such State would be lawful; but such liquors may also be shipped to and sold in a State where there are no such prohibitory laws; and to avoid embarrassment and seeming conflict with local laws this should always be done.

Liquor entered in a bonded warehouse under Senate joint resolution of October 6, 1917 (40 Stat. 427), may be withdrawn for export for the full period of one year from the date of entry, not counting any time during which an order or proclamation of the President may have prevented its exportation; but such liquor can not be forfeited to the Government until it shall have been in the warehouse as long as three years, excluding any time when its exportation or transshipment shall have been prevented by an order of the President.

Modified in part by opinion of December 2, 1919 (32 Op. 62).

DEPARTMENT OF JUSTICE,
March 18, 1919.

SIR: I have the honor to acknowledge your letter of March 15, stating that the various collectors of customs are holding in their custody quantities of distilled spirits and wines which were seized as having been imported in violation of section 15 of the Food Control Act of August 10, 1917, section 301 of the revenue act of October 3, 1917, and section 1 of the act approved November 21, 1918, prohibit-

ing the importation of distilled, malt, vinous, or other intoxicating liquors, and also stating that quantities of spirits are under bond in warehouses as authorized by Senate joint resolution No. 99, of October 6, 1917, permitting the entry under bond for exportation within one year from the date of entry of any distilled spirits shipped from a foreign country prior to September 1, 1917.

You state that no provision is made by these statutes for the disposition of the spirits imported in violation of their provisions, and submit to me five questions, which will be stated in connection with my answers thereto.

Section 15 of the Food Control Act of August 10, 1917 (40 Stat. 282), contains this language:

"Nor shall there be imported into the United States any distilled spirits."

Section 301 of the revenue act of October 3, 1917 (40 Stat. 308), prohibits the importation of distilled spirits save for certain excepted purposes.

Section 1 of the act approved November 21, 1918 (40 Stat. 1046), is, in part, as follows:

"The Commissioner of Internal Revenue is hereby authorized and directed to prescribe rules and regulations, subject to the approval of the Secretary of the Treasury, in regard to the manufacture and sale of distilled spirits and removal of distilled spirits held in bond after June 30, 1919, until this Act shall cease to operate, for other than beverage purposes; also in regard to the manufacture, sale, and distribution of wine for sacramental, medicinal, or other than beverage uses. After the approval of this Act no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization: *Provided*, That this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this Act."

Joint resolution No. 99, approved October 6, 1917 (40 Stat. 427), is as follows:

"That the Secretary of the Treasury be, and he is hereby, authorized and directed to permit the entry of distilled

spirits shipped from any foreign country to the United States prior to September first, nineteen hundred and seventeen, into bonded warehouses in the United States, under bond to be given by the importer of such distilled spirits, conditioned for the export of such goods to some foreign country within the period of one year from and after the entry thereof into the United States."

The questions submitted and my answers thereto are as follows:

(1) "Can spirits brought into the United States in violation of the acts above cited be seized and forfeited under section 3082 of the Revised Statutes as having been imported contrary to law?" Section 3082 of the Revised Statutes expressly provides that any merchandise fraudulently or knowingly imported or brought into the United States shall be forfeited. I am therefore of opinion, beyond doubt, spirits brought into the United States in violation of the acts mentioned may be seized and forfeited under this section.

(2) "When the value of such spirits is not more than \$500 can they be forfeited and sold by summary proceedings under sections 3074 to 3077, inclusive, of the Revised Statutes?" The sections referred to provide a summary method of sale "in all cases of seizure of property subject to forfeiture for any of the causes named in any provision of law relating to the customs," etc. Liquors imported in violation of the statutes referred to are not subject to customs duties. Their importation is simply prohibited. The offense consists in bringing them in at all and not in bringing them in without the payment of duty or tax. If the language quoted from section 3074 be construed as applying only to laws for the imposition and collection of customs duties, the summary method of selling would be confined to property brought into the country in violation of such laws and would not include that brought in in violation of a mere prohibition against importation. But I do not think the language can fairly be given so narrow a construction. The whole matter of importing property into the United States is subject to the proper control of the

customs officers to whom the enforcement of such laws is committed. I think, therefore, a law which prohibits particular property from being brought into the country through the ports is a law "relating to the customs" as much as a law which imposes customs duties. I am accordingly of opinion that when the value of spirits imported contrary to law, because in violation of the statutes mentioned, is not in excess of \$500 they may be forfeited and sold by the summary proceedings provided for in sections 3074 to 3077 of the Revised Statutes.

(3) "May spirits or other intoxicating liquors brought into the United States in violation of either of the acts mentioned be permitted to be exported?" As section 3082 of the Revised Statutes expressly provides for the forfeiture of such spirits, this question must, in general, be answered in the negative. It is stated, however, that in several instances where liquor was imported into the United States contrary to the provisions of the act of August 10, 1917, and the other acts referred to, the importer brought in such liquors in good faith and in ignorance of such legislation, having immediately before making the shipments made inquiry of the United States consuls at foreign ports and being informed that there was no law prohibiting the importation of such liquors. The act of August 10, 1917, became effective September 1, 1917. Offenses under it are limited to those who "willfully" violate its provisions, and section 3078 of the Revised Statutes provides that where such liquors have been seized and sold under the summary proceedings provided the owner shall be entitled to receive from the United States the proceeds of sale upon a showing that he "did not know of the seizure, and was in such circumstances as prevented him from knowing of the same, and that such forfeiture was incurred without willful negligence or any intention of fraud on the part of the owner of such property." In the instances referred to I am of opinion that you would be authorized to permit the liquor to be exported instead of having it sold.

(4) "When spirits, wines or other intoxicating liquors are forfeited to the United States in a State where the sale

of distilled spirits or intoxicating liquors is prohibited by State laws (a) can such spirits be sold by the United States in the State where forfeited; and (b) if not, can they be shipped to and sold in a State where the State laws do not prohibit the sale of distilled spirits?" I am inclined to the opinion that such sales would not be unlawful even in States whose laws prohibit the sale of liquor. There is no doubt, however, that such liquors may be shipped to and sold in a State where there are no such prohibitory laws, and to avoid embarrassment and seeming conflict with local laws I am of opinion that this should always be done.

(5) "May spirits entered for warehousing under Senate joint resolution of October 6, 1917, be withdrawn for exportation after one year from the date of entry? If not, can such spirits be forfeited and sold or otherwise disposed of by a collector of customs?" As stated above, the Food Control Act was approved on August 10, 1917, and went into effect September 1, 1917. Upon its going into effect Congress evidently assumed that there was a large amount of liquor in the country which had previously been imported. Since the sale here of that liquor had suddenly been prohibited, the joint resolution referred to was passed to provide a reasonable opportunity to dispose of it by exporting it. Accordingly the joint resolution authorized its entry into bonded warehouses under bond to be given by the importer of such distilled spirits conditioned for the export of such goods to some foreign country within the period of one year from and after the entry thereof into the United States. Nothing else appearing, I would say that for a period of one year following its entry into the bonded warehouse the owner of such liquor would be free to export it, and that after the expiration of one year it would stand in the same plight as other liquor lawfully in bonded warehouses.

Section 2971 of the Revised Statutes is as follows:

"Any goods remaining in public store or bonded warehouse beyond three years shall be regarded as abandoned to the Government, and sold under such regulations as the Secretary of the Treasury may prescribe, and the proceeds

paid into the Treasury. In computing this period of three years, if such exportation or transshipment of any merchandise shall, either for the whole or any part of the term of three years, have been prevented by reason of any order of the President, the time during which such exportation or transshipment of such merchandise shall have been so prevented shall be excluded from the computation."

I am of the opinion that the owner of liquor entered in a bonded warehouse under the joint resolution mentioned was entitled to be free to export it for the full period of one year, not counting any time during which an order or proclamation of the President may have prevented its exportation. In all cases in which the owner has been thus free to export the liquor for 12 months his right to export it has expired. But the joint resolution does not provide that immediately upon the expiration of these 12 months the liquor shall be forfeited. I think the result is that it must remain in the bonded warehouse subject to section 2971 of the Revised Statutes. Having been entered under a bond that it should be exported, there would seem to be no way to remove it from the warehouse. On the other hand, under section 2971 it can not be said to be forfeited to the Government until it shall have been in the warehouse as long as three years, excluding any time when its exportation or transshipment shall have been prevented by an order of the President. At the same time, whenever the three years during which no order of the President stands in the way of its exportation has expired it will be forfeited to the Government and may be sold unless in the meantime Congress shall have given relief by providing for its removal in some other way than that provided by the joint resolution of October 6, 1917. I am, however, of opinion that it can not be forfeited and sold until it has been in the warehouse for three years free from any such order of the President as is above mentioned.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.

**TAX ON CASUALTY INSURANCE POLICIES ISSUED ON
WEEKLY OR MONTHLY PAYMENT PLAN.**

In calculating the tax imposed by the proviso of section 503 (c) of the Revenue Act of 1918, approved February 24, 1919 (40 Stat. 1104), on casualty insurance policies, issued on the weekly or monthly payment plan, only the regular weekly or monthly premium can be included and the policy fee must be excluded.

DEPARTMENT OF JUSTICE,
March 19, 1919.

SIR: I have the honor to acknowledge your letter of March 13, asking for an opinion with respect to the tax imposed by the proviso of section 503 (c) of the Revenue Act of February 24, 1919, in the case of casualty insurance policies issued on the monthly-payment plan. The facts stated are these: It appears that for some years certain insurance companies have issued accident insurance policies and health insurance policies, and combined health and accident insurance policies, on the monthly-payment plan, the insured, at the time of making application for the policy, paying a lump sum designated in the policy contract as the "policy fee" and an additional sum designated as the "monthly premium." The amount represented by the so-called "policy fee" is paid but once, the insurance being carried thereafter for the stipulated monthly premium mentioned in the policy contract. It is stated by the company that the policy fee is in addition to the monthly premium and is wholly retained by the agent for his services, the insurance given by the policy being granted by its terms for a monthly premium as cited therein, which is wholly separate and distinct from the policy fee.

The Revenue Act of 1918, section 503, under the heading "Insurance," provides for "the following taxes on the issuance of insurance policies" (40 Stat. 1104). The taxes are then levied under three heads:

"(a) Life insurance: A tax equivalent to 8 cents on each \$100 or fractional part thereof of the amount for which any life is insured under any policy of insurance, or other instrument, by whatever name the same is called."

To this is attached a proviso:

"That on all policies for life insurance only by which a life is insured not in excess of \$500, issued on the industrial or weekly or monthly payment plan of insurance, the tax shall be 40 per centum of the amount of the first weekly premium or 20 per centum of the amount of the first monthly premium, as the case may be."

And by another proviso the same tax is levied against policies on the industrial plan covering life, health, and accident insurance combined in one policy, by which a life is insured not in excess of \$500.

"(b) Marine, inland, and fire insurance: A tax equivalent to 1 cent on each dollar or fractional part thereof of the premium charged under each policy of insurance or other instrument by whatever name the same is called."

"(c) Casualty insurance: A tax equivalent to 1 cent on each dollar or fractional part thereof of the premium charged under each policy of insurance."

And to this is attached the proviso:

"That in case of policies of insurance issued on the industrial or weekly or monthly payment plan the tax shall be 40 per centum of the amount of the first weekly premium or 20 per centum of the amount of the first monthly premium, as the case may be."

The section referred to provides that these taxes shall be in lieu of the taxes imposed by section 504 of the revenue act of 1917 (40 Stat 315). The latter section had provided for a tax of 1 per centum on each dollar or fractional part thereof of the "premium charged," irrespective of the plan upon which the insurance should be issued. The act of 1919 thus changes the whole plan of assessing these taxes. As to life insurance the tax is levied without reference to the amount of premium paid, but is a fixed tax on each \$100 of the amount of insurance. In the case of marine, inland, and fire insurance, as well as casualty insurance, the tax is 1 per centum of the *premium charged*. But out of the general classes of life and casualty insurance there is carved a special class of insurance issued on what is com-

monly known as the industrial plan, or the weekly or monthly payment plan, where the amount of insurance does not exceed \$500. A special method of taxing this class of insurance is adopted, whether the policy be merely a life policy, a casualty policy, or a policy covering life, health, and accident. The tax is to be 40 per centum of the amount of the "first weekly premium," or 20 per centum of the amount of the first "monthly premium." In the case of casualty insurance generally, the tax is a fixed per cent of "the premium charged" under each policy. In the case of industrial insurance, however, it is a fixed per cent of *the amount of the first weekly or monthly premium*. In this class of insurance there is a fixed sum, the payment of which is to recur each week or each month, and which is known as a weekly or monthly premium. In addition, upon the issuance of the policy a fixed sum is charged and called a policy fee, and this is paid to the agent for his services. In a sense, at least, this may be called a premium, since it is a part of the consideration paid for the issuance of the policy. And in the case of marine, inland, and fire insurance, as well as casualty insurance in general, where the tax is levied on "the premium charged," it would probably be treated as a part of the premium. But in the case under consideration the language used is different. It is a fixed per cent of the amount of the first weekly or monthly premium. A weekly premium is one which must be paid each week during the life of the policy. Manifestly, the amount of the *weekly premium* is the amount which must be paid regularly week after week. The tax is not levied on the first *payment*, but on the first weekly or monthly premium. The first payment, as actually made, consists of two items: A fixed sum or policy fee, and the amount which must be paid regularly each week or each month thereafter. Congress could, of course, have made the amount which the insured is required to pay upon the delivery of the policy the basis for the tax. On the other hand, it could, if it saw fit, measure the tax by the amount to be paid regularly each week or month. Every person taking such insurance understands that what is meant by a weekly premium is the amount which he must pay at

weekly intervals. I think Congress has manifested a clear intention to make this amount the basis for the tax and that the policy fee is entirely separate and distinct from the weekly or monthly premium. I am therefore of opinion that in calculating the tax only the regularly weekly or monthly premium can be included and that the policy fee must be excluded.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.

STATUS OF MR. WILLIAMS AS MEMBER OF FEDERAL
RESERVE BOARD.

Mr. John Skelton Williams, whose nomination for reappointment was not acted upon by the Senate prior to its adjournment, has continued to exercise the duties of the office of Comptroller of the Currency since the expiration of his original term of office on January 19, 1919. Under such circumstances he remains Comptroller of the Currency *de jure*, and consequently is a legally qualified member of the Federal Reserve Board.

Since Mr. Williams holds the office of Comptroller of the Currency *de jure*, it follows that he is entitled to receive the salary prescribed by section 10 of the Federal Reserve Act to be paid to the Comptroller of the Currency as *ex officio* member of the Federal Reserve Board.

DEPARTMENT OF JUSTICE,

March 20, 1919.

SIR: I have the honor to reply to your letter of March 15, 1919, in which you ask my opinion upon a question with respect to the present status of Mr. John Skelton Williams as a member of the Federal Reserve Board. Section 10 of the Federal Reserve Act (38 Stat. 260) provides, in part, as follows:

"A Federal Reserve Board is hereby created which shall consist of seven members, including the Secretary of the Treasury and the Comptroller of the Currency, who shall be members, *ex officio*, and five members appointed by the President of the United States, by and with the advice and consent of the Senate * * *."

The question which you put is whether, under the circumstances which you recite, Mr. Williams is the Comptroller of the Currency and by virtue of that office therefore a member of the Federal Reserve Board.

It appears that Mr. Williams was appointed Comptroller of the Currency, by and with the consent of the Senate, under a commission dated January 29, 1914. His appointment was made under section 325 of the Revised Statutes, in which it is provided that the Comptroller of the Currency, so appointed, "shall hold office for the term of five years unless sooner removed by the President." Upon the expiration of the five years so provided as the ordinary term of office of the comptroller, on January 19, 1919, the President determined to appoint Mr. Williams to succeed himself and thereupon sent his name to the Senate for confirmation. The Senate adjourned, however, without taking any action in the premises.

Since January 19, 1919, Mr. Williams has continued to exercise the duties of the office of Comptroller of the Currency and has received the salary thereof by virtue of the provisions of the act of March 2, 1895 (28 Stat. 844), which are as follows:

"That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay to all officers under the Treasury Department whose terms of office have expired or shall expire before the appointment and qualification of their successors, and who have been performing or shall perform the duties of their respective offices after the date of such expiration, the salary, compensation, fees, or emoluments authorized or provided by law in each case for the respective incumbents of the offices: *Provided*, That no such payment shall be made for any services rendered by any such officer wrongfully holding after the appointment and qualification of his successor."

This statute was construed by Mr. Attorney General Moody in an opinion rendered June 27, 1906 (25 Op. 636). In his view the statute provided for the "continuance in office" of officers under the Treasury Department. I have no reason to question this conclusion which is reinforced by the consideration that under such circumstances, the offi-

cer continues obviously to act under and by virtue of his original appointment or commission. In other words, the language must be taken to be equivalent to the phraseology of many State statutes which provide that a term of office shall continue for a specified time and thereafter until the officeholder's successor shall have been appointed and qualified.

If this view is sound, and I think it is, the case which you put falls within numerous decisions that under such circumstances the officer holding over holds *de jure* and not merely *de facto*. *People v. Tilton*, 37 Cal. 614, 623; *State v. Bulkeley*, 61 Conn. 287, 358; *People v. Reid*, 11 Colo. 138; *State v. Harrison*, 113 Ind. 434, 442; *State v. Fabrick*, 16 N. Dak. 94; *State v. Howe*, 25 Ohio, 588, 595; *Hogan v. Hamilton County*, 132 Tenn. 554, 29 Cyc. 1399.

If Mr. Williams remains Comptroller of the Currency, *de jure*, it follows that he remains also, by virtue of that circumstance, a legally qualified member of the Federal Reserve Board. I concur therefore with the opinion of the counsel for the Federal Reserve Board that Mr. Williams is such a legally qualified member.

You ask me also for my view upon the question whether in that event Mr. Williams is entitled to receive the salary prescribed by the statute to be paid to the Comptroller of the Currency as *ex officio* a member of the Federal Reserve Board. It follows from what I have said that he is so entitled and I so advise you.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.

INCOME TAX—HOULTON GRANGE ASSOCIATION.

An association known as "Houlton Grange," composed of persons engaged in agriculture, which acts as the agent of its members for the purchase of goods needed by them, reselling the goods to them at prices fixed by the association, is not exempt from the income tax imposed by the revenue act of September 8, 1916 (39 Stat. 765, 766), because it does not operate under the lodge system or provide for benefits to its members, and because it does

not operate as sales agent for the purpose of marketing the products of its members.

As far as this tax is concerned, the association in question stands upon the same footing as any individual, partnership, or corporation whose business it is to buy and sell merchandise, and the tax is levied not upon the gross income but the net income.

DEPARTMENT OF JUSTICE,

March 26, 1919.

SIR: I have the honor to acknowledge receipt of your letter of February 17, asking for an opinion as to the liability for an income tax of an association known as "Houlton Grange," which you describe as follows:

"It is a fraternal association, composed of persons engaged in agriculture, and acting under the laws and by-laws of the State Grange of Maine, and the National Grange, Patrons of Husbandry. The association acts as the agent of its members for the purchase of goods which they need, reselling the same to them at prices fixed by the association. Its by-laws also provide for a committee on relief, whose duty it is to visit sick members, and render assistance to them, under the direction and at the expense of the association. It does not appear that the association is operated under the lodge system, or for the benefit of members of an association so operating. Except as stated above, it does not appear that the association makes provision for life, sick, accident or other benefits to its members."

The revenue act of 1916 (39 Stat. 765, 766) levies a tax upon the income of "every corporation, joint-stock company or association, or insurance company, organized in the United States, no matter how created or organized but not including partnerships." Certain exceptions are then made from the operation of this provision. The only ones, however, which could by any possibility be thought to apply to such an association as is described above are the following:

"Fraternal beneficiary society, order, or association, operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating

under the lodge system, and providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents."

"Farmers', fruit growers', or like association, organized and operated as a sales agent for the purpose of marketing the products of its members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of produce furnished by them."

The first exception manifestly was intended to apply to well-known classes of associations, the purpose of whose organization—or, at least, one of its purposes—is to provide for the payment of life, sick, accident, or other benefits to the members. Laws providing for the organization of such associations have been enacted in nearly all of the States. They are, in substance, quasi insurance companies. The Act in question has defined in very plain language the associations to which reference is made. They are to be fraternal beneficiary societies or orders, they are to operate under the lodge system, and they are to provide for the payment of life, sick, accident, or other benefits to members. To come within the exemption of the act any association must possess these characteristics. In the present case, as stated by you, the association does not operate under the lodge system and it does not provide for the payment of life, sick, accident, or other benefits such as are usually provided for in a quasi insurance company, which Congress manifestly had in contemplation. Such associations, so far as they are engaged in business at all, are engaged in a species of insurance business. The association now under consideration is actively engaged in the business of buying and selling goods—that is, dealing in merchandise. It has a relief committee, whose members visit sick members and render assistance to them when the association so directs. This is an incident of the fraternal rather than the beneficiary feature of an association. The association in question, in my opinion, is excluded from the exemption both because it does not operate under the lodge system and because it does not, as contemplated by the act, provide for benefits to members.

This association, it is equally plain, is excluded from the benefits of the second paragraph of the act quoted above. That paragraph manifestly intended to exempt from the tax certain associations of farmers and fruit growers. It did not, however, exempt all such associations. On the contrary, it limited the exemption to such associations as should operate as sales agent for the purpose of marketing the products of its members. This association does not do this. It acts as the agent of its members for carrying on the business of purchasing such goods as the members need and reselling them to the members. In other words, it is not a sales agent, but a purchasing agent. It, in fact, is a dealer in merchandise.

In my opinion, so far as this tax is concerned, the association in question stands upon the same footing as any individual, partnership, or corporation whose business it is to buy and sell merchandise. The tax, however, is levied not upon the gross income but the net income—that is, upon the profits which it makes by buying and selling merchandise. If it operates under a plan by which it sells to members at actual cost, no profits are realized, there is no net income, and no tax is paid. If, on the other hand, it sells at a profit, like any other dealer in merchandise, it has a net income and must pay the tax on it.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.

CIVIL SERVICE—PREFERENCE IN APPOINTMENTS—SOLDIERS, SAILORS, AND MARINES, AND THEIR WIDOWS.

In so far as the provision of section 6 of the Census Act of March 3, 1919, which grants a preference in appointments to "honorably discharged soldiers, sailors, and marines, and the widows of such," relates to the executive departments, it affects only such appointments as shall be made for service at the seat of Government or in the so-called field forces of executive departments which operate away from Washington but under immediate and direct orders therefrom, and not out of some local office or branch of the Government, such as a local post office, customhouse, or office of an internal-revenue collector; and as to independent govern-

NOTE.—Opinion of March 29, 1919, relating to tax on beer, p. 615.

mental establishments, this provision applies to all positions in all offices under the control of such establishments wherever located. Section 1754 of the Revised Statutes gives a preference in the matter of appointment to civil offices to persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty without regard to where these offices may be located, and while this section is more restricted than section 6 of the Census Act as to the persons in whose favor a preference is given, there is no conflict in so far as these provisions apply to the same appointments and the one does not give preference over the other.

As there is nothing in the Census Act to indicate a purpose to adopt and make permanent the rules and regulations previously in force relating to section 1754 of the Revised Statutes and to apply them under that Act, the matter of making proper rules and regulations is left to the administrative officials, who may adopt those now in force or promulgate new ones as they may deem proper.

DEPARTMENT OF JUSTICE,

March 29, 1919.

SIR: I have the honor to acknowledge receipt of your letter of March 18, 1919, transmitting a request by the members of the Civil Service Commission for an opinion on certain questions arising under the following provision of the Census Act, approved March 3, 1919:

"Provided, That hereafter in making appointments to clerical and other positions in the executive departments and in independent governmental establishments preference shall be given to honorably discharged soldiers, sailors, and marines, and widows of such, if they are qualified to hold such positions."

The first question submitted is whether this provision applies only to the executive departments and independent governmental establishments in Washington, D. C., and not to Government offices in the field service.

It has long been the recognized rule that the executive departments are by law established at the seat of Government and not elsewhere. Accordingly, my predecessors have uniformly ruled that the terms "executive departments" and "departments," as ordinarily used in the acts of Congress, are terms of art, whose meaning is confined to offices and bureaus located at the seat of Government, together with the so-called field forces, which, in theory,

are only temporarily absent from Washington. (15 Op. 262, 267; 29 Op. 481, 485.)

I am in entire accord with these views and am of the opinion that so far as the proviso in question relates to the "executive departments" it affects only such appointments as shall be made for service at the seat of Government, or in the so-called field forces of departments which operate away from Washington but under immediate and direct orders therefrom, and not out of some local office or branch of the Government service—such as a local post office, customhouse, or office of an internal-revenue collector.

There are, however, offices, bureaus, commissions, and branches of the Government service at Washington which are entirely independent of any regular executive department. I refer to the Civil Service Commission (22 Op. 62), the Government Printing Office, and the Interstate Commerce Commission (26 Op. 209, 214), and similar governmental agencies. These are manifestly "independent governmental establishments," mentioned by the proviso. The provision quoted, in express terms, applies to them. The purpose evidently was to include along with the executive departments, whose status had been fixed as above stated, any other independent governmental establishments that may have been created by Congress. Manifestly, this means establishments which are independent of the regular executive departments. Congress has the power to create these establishments, and while they are usually located at Washington there is no reason why they may not be located elsewhere if Congress sees fit. I am of opinion, therefore, that the proviso is not necessarily confined to offices of these independent establishments located in Washington. It results that my opinion, in answer to the first question, is that as to the executive departments it affects only such appointments as shall be made for service at the seat of government or in the so-called field forces of executive departments which operate away from Washington but under immediate and direct orders therefrom, and not out of some local office or branch of the Government, such as a local post office, customhouse, or office of an internal revenue collector. As to independent governmental establishments, the provision applies to all positions

in all offices under the control of such establishments wherever located.

The second question is:

"Does this provision supersede section 1754, Revised Statutes, which requires preference to be given to soldiers and sailors honorably discharged on account of disability incurred in the line of duty? If it does not supersede section 1754, must persons within the provisions of the latter be given rank ahead of the class covered by the Census Act?"

Section 1754 of the Revised Statutes is as follows:

"Persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty, shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices."

It will be observed that, as to the persons in whose favor a preference is granted, this section is more restricted than the one now under consideration. It applies only to persons discharged from the military or naval service "by reason of disability resulting from wounds or sickness incurred in the line of duty." The present act applies to "honorably discharged soldiers, sailors, and marines, and widows of such," without reference to any disability incurred in the line of duty. On the other hand, section 1754, with respect to the offices or positions affected, is much broader than the present act. It gives a preference in the case of "appointments to civil offices" without regard to where these offices may be located. But, as has been stated, the present act applies only to positions in offices under the executive departments located at Washington and to appointments under independent governmental establishments.

The two acts not covering the same field the one does not repeal the other. In so far as they apply to the same appointments, there is no conflict and the one does not give any preference over the other. So far as appointments in the executive departments and in independent governmental establishments are concerned, soldiers and

sailors honorably discharged on account of disability incurred in the line of duty were at the time of the passage of the act now under consideration already in a preferred class. The effect of the passage of that act was simply to add to the existing class others—that is, honorably discharged soldiers, sailors, and marines, and widows of such—without regard to whether they were discharged on account of disability. As to these appointments, then, no distinction is to be made between those brought into the favored class by the one act or the other—the status of all is the same.

As to civil offices not included in the provision now in question no other persons have been added to the favored class created by section 1754, and as to these offices that class remains just as it was before the passage of the Census Act.

The third question is whether the exact preference allowed under section 1754, Revised Statutes, has been fixed by the President's rules and the interpretation of the Commission, and may it be assumed that Congress, cognizant of the preference allowed under section 1754 intended, in the use of the term "preference," to provide for precisely the same treatment of that class of persons covered by the provision of the Census Act as is now given that class of persons covered by the provisions of section 1754, or should the President, by rule, define the preference to be allowed under the Census Act.

I am clearly of the opinion that there is nothing in the Act to indicate a purpose to adopt and make permanent the rules and interpretations previously in force relating to section 1754, Revised Statutes, and to apply them under the new act. My opinion is that the matter of making proper rules and regulations is left to the administrative officials, who may adopt those now in force or promulgate new ones as they may deem proper.

Respectfully,

A. MITCHELL PALMER.

To the PRESIDENT.

PLAN FOR STABILIZING PRICES IN THE BASIC
INDUSTRIES—ANTITRUST LAWS.

The proposed plan of the Industrial Board of the Department of Commerce to stabilize prices in the so-called basic industries by means of agreements with the leading manufacturers and producers, not being authorized by statute, would be in violation of the antitrust laws.

DEPARTMENT OF JUSTICE,

April 1, 1919.

SIR: I have received your letter of March 26, 1919, inquiring whether the plan therein proposed by the Industrial Board of the Department of Commerce to stabilize prices in the basic industries would be legal. I need not say that I approach the question in full sympathy with your desire to ameliorate the conditions attendant upon the transition of industry from a war to a peace footing.

After setting forth the present abnormal industrial conditions and the organization of the Industrial Board to meet them, you state the substance of the plan with respect to prices as follows:

"It was therefore considered that one of the first steps which the board should take would be to call into consultation and conference the leaders of industries producing basic materials, and that at such conferences the general situation or conditions should be considered and carefully understood; furthermore, that it would be the endeavor of the board to act promptly by consulting and interchanging views with these representatives of industry in the fullest and freest manner possible, with a view to aiding and assisting industry in general to resume activities to the fullest practicable extent. The immediate object of these conferences would be to bring about such reduced prices as would bring the buying power of the Government itself, including the railroads, telephones, and telegraphs, into action and make it possible for the Government to state that it is willing to be a buyer for its needs at the reduced prices. If these conferences should result in such an understanding on the part of the Government, with respect to the important basic industries, concerning proper prices and bases for prices at which purchases may be

made by it, and these are approved by the board, it is believed that upon announcement thereof to the country in general the public will feel justified in promptly beginning a program of extensive buying. Such a procedure would in substance establish immediately a basis upon which to resume activities, and in this way the law of supply and demand would be enabled to come into play."

In a subsequent paragraph you indicate how the plan has been applied in the steel industry, as follows:

"In accordance with the program adopted by the Industrial Board, the first conference with leaders of industry was held on March 19 with a committee of 16 members appointed by representatives of the entire iron and steel industry of the United States. At this conference, which extended through several sessions, covering a period of two days, the purpose and duty of the board were fully set forth; and all matters relating to the cost of production and other facts and circumstances concerning the iron and steel industry were discussed and considered, with a view to determining what would be a fair price for which the Government, and likewise the public, could obtain their commodities. As a result, representatives of the iron and steel industry submitted a schedule showing substantial reductions in the present selling prices of principal articles of iron and steel for which they were willing to sell to the Government and the public. However, the board suggested further reductions, which suggestion was favorably considered by the representatives of the industry present, and the board thereupon approved the schedule as a statement of prices which were considered fair and which it was believed were as low as could be expected during the current year."

You also state that "no one will be under any sort of compulsion to adhere to the price schedules arrived at." I take it, however, that while there may be no compulsion in the sense of a penalty, the plan must contemplate that the prices agreed upon will be generally observed and that that will be its effect.

While the statement of the plan is not as clear and complete in some respects as might be considered, enough

appears to make it plain that the purpose is to fix prices in all the basic industries by agreement instead of by competition, on the assumption that the readjustment of prices to a peace basis can be accomplished better by artificial action than through the operation of the natural laws of trade.

In determining the legality of the plan it is necessary, first, to consider it simply as an arrangement between private producers, and, secondly, to consider whether the situation is altered by the fact that the arrangement would be entered into in cooperation with the Industrial Board.

1. Whatever differences of opinion there may be as to the wisdom of the policy, Congress by the Sherman Act (26 Stat. 209), by the Wilson Act (28 Stat. 570; 37 Stat. 667), by the Federal Trade Commission Act (38 Stat. 717), and by the Clayton Act (38 Stat. 730), has ordained the competitive system of industry for the United States; and within the last year in authorizing associations in foreign trade Congress expressly reaffirmed that policy, declaring as a condition—

“That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.” (Act of Apr. 10, 1918, 40 Stat. 517.)

In *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129, the Supreme Court, referring to statutes such as these, said:

“According to them, competition, not combination, should be the law of trade.”

What Congress has thus established as the law of trade only Congress can set aside.

Of all forms of restraint of trade, price-fixing agreements have been the most common. No rule of law is better established than that such agreements are illegal and void. The rule was thus stated in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 408:

"But agreements or combinations between the dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void."

While citation of cases on so elementary a principle is unnecessary, the following are apposite: *Standard Sanitary Co. v. United States*, 226 U. S. 20; *Swift v. United States*, 196 U. S. 375; *People v. Sheldon*, 139 N. Y. 251; *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401, 405; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; *Nester v. Continental Drilling Co.*, 161 Pa. St. 473; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Oil Co. v. Adoue*, 83 Tex. 650; *India Bagging Ass'n v. Koch*, 14 La. An. 168; *Noyes, Inter-
corporate Relations*, 513, note 1.

To bring a price-fixing agreement within the condemnation of the law it is not necessary that it be in writing or that it be an express agreement. The law prohibits combinations as well as contracts, and it is elementary that a combination may be brought about through an informal meeting of the minds as well as through formal contract. *Thomsen v. Cayser*, 243 U. S. 66, 84; *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U. S. 600, 612; *United States v. U. S. Steel Corp.*, 223 Fed. 55, 160; *United States v. Kellogg Toasted Corn Flake Co.*, 222 Fed. 725, 730-731.

Nor is it necessary to make such an agreement unlawful that the parties should be under compulsion by penalty or otherwise to observe it. The case of *United States v. U. S. Steel Corp.*, 223 Fed. 55, involved, among other things, a situation where representatives of the leading companies in the industry were accustomed to meet periodically at dinner for a discussion of trade conditions, including prices. The court found from the evidence that these meetings resulted in an understanding concerning prices which amounted to a combination in restraint of trade.

In discussing such arrangements in general Circuit Judge Buffington said:

"When, therefore, individuals or corporations make distinct contracts with each other, either in the form of pools or other agreements, dividing territory, limiting output, or

fixing prices, there can be no question about the illegality of such contracts. And it makes no difference whether or not the agreement attempts to fix a penalty for its breach. The essence of the offense is that agreement; the penalty is merely an incident; so that a so-called 'gentlemen's agreement' to divide territory, etc., is quite as illegal as a formal pool with a formal penalty. In a gentlemen's agreement the sanction is the sense of honor, the moral obligation, the indefinite, but real, force that in some instances compel persons to keep their promises simply because they have promised." (P. 155.)

With respect to the arrangement there under consideration the judge concluded as follows:

"We have no doubt that among those present some silently dissented and went away intending to do what they pleased; but many, probably most, of the participants understood and assented to the view that they were under some kind of an obligation to adhere to the prices that had been announced or declared as the general sense of the meeting. Certainly there was no positive and expressed obligation; no formal words of contract were used; but most of those who took part in these meetings went away knowing that prices had been named and feeling bound to maintain them until they saw good reason to do otherwise. * * * The final test, we think, is the object and the effect of the arrangement, and both the object and effect were to maintain prices, at least to a considerable degree." (Pp. 160-161.)

Finally, it is no defense that such an agreement was induced by good intentions and may have some good effect. The theory of the law is that on the whole the evil effects of such agreements outweigh their possible good. *Freight Association Case*, 166 U. S. 290, 337; *Joint Traffic Case*, 171 U. S. 505, 576-577; *Northern Securities Case*, 193 U. S. 197, 351-352; *Standard Sanitary Co. v. United States*, 226 U. S. 20, 40, 49; *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U. S. 600, 613; *International Harvester Co. v. Missouri*, 234 U. S. 199, 209.

If it be thought that this theory does not hold good in the present conditions the appeal should be to Congress.

To quote again from the *Steel Case*, *supra*, this time from the opinion of Circuit Judge Woolley, in which Circuit Judge Hunt concurred:

"I know of no law which makes *the steadying of the market* a justification for fixing and maintaining prices by the concerted action of otherwise competing companies, when the effect of steadying the market is to dominate the industry by establishing prices for its products. The perfection of stabilizing prices can be reached only when monopoly is perfect, and as nothing justifies monopoly, I am of opinion that the stabilizing benefits claimed by the defendants in fixing and maintaining prices are no justification or excuse for what they did. * * * If the establishment of uniform prices for the products of an industry should be ever found advantageous or necessary, such an economic policy should be inaugurated and pursued under the authority of law, and not by the will of the industry itself." (223 Fed. 172.) [*Italics in opinion.*]

The foregoing considerations lead irresistibly to the conclusion that the proposed plan, viewed simply as an arrangement between private producers, would be in violation of the antitrust laws.

2. It remains to consider the effect, if any, of that fact that the arrangement will be carried out under the guidance of the Industrial Board.

In a letter to the President dated August 23, 1917, the Attorney General considered generally the authority of the President under the so-called Food Control Act (40 Stat. 276), to enter into agreements with certain industries which would have the effect of fixing prices or pooling output. By section 2 of the act mentioned the President was specifically authorized "to enter into any voluntary arrangements or agreements" to carry out the purposes of the act. The Attorney General expressed the view that the President was authorized to enter into such price-fixing agreements, provided they bore a reasonable relation to the purposes of the act.

The Attorney General said:

"I am of the opinion that any agreement made with producers or traders *by the Government itself* (through

the Food Administrator acting under the direction of the President), under authority of section 2 of the act, and having a reasonable relation to the objects enumerated in section 1, for example, to assure an adequate supply and equitable distribution of necessities and to establish and maintain governmental control of necessities during the war, would not fall within the operation of the Sherman antitrust act, even though the effect of the agreement or agreements were to fix a uniform price or to accomplish a pooling of output. This, because *governmental action* with respect to prices or methods of distribution is obviously not within the mischief at which the Sherman law was aimed." [Italics in original.]

But the Attorney General added:

"I am equally clear that the President has no power under the food control act to authorize price fixing or pooling agreements between the producers or traders themselves."

In an opinion to the United States Food Administration dated January 9, 1919, the Attorney General restated the principles enunciated in the above-mentioned letter and applied them to the facts before him. In substance he held that a certain agreement negotiated by the Food Administration with the leading refiners of sugar in the United States, which provided that until December 31, 1919, the refiners should purchase their entire requirements of raw sugar from the United States Sugar Equalization Board, Inc. (an agency of the Food Administration), and that during such period the refiners should observe a fixed maximum price on all sugar manufactured by them, was authorized by the Food Control Act and not prohibited by the Sherman Act (31 Op. 376).

The real basis of these opinions, it will be noted, is that the agreements under consideration were found to be specifically authorized by section 2 of the Food Control Act. The Food Control Act being the later act it follows that to the extent that its provisions were inconsistent with the provisions of the Sherman Act, it operated to repeal or supersede the latter. In the light of this explanation the

distinction in principle between the agreements involved in these opinions and the present proposed plan of the Industrial Board is apparent. The Industrial Board not being a creature of statute has not been clothed by Congress with any powers which would remove contracts made by it from the operation of the Sherman Act. It follows, therefore, that the legal effect of the proposed plan is not altered by the fact that it would be carried out through the Industrial Board.

3. Lastly, considering the proposed arrangement in its narrowest aspect, as simply a plan for arriving at prices at which the Government establishments shall purchase their requirements, I am equally clear that the plan is unauthorized.

In no less than thirty statutory provisions Congress has announced its purpose that the purchase of Government supplies shall be governed by the competitive system.¹ Section 3709 of the Revised Statutes provides that all purchases and contracts for supplies "in any of the Departments of the Government" shall, except in case of public exigency, be made by advertising for a sufficient length of time for proposals. Section 1 of the Act of February 24, 1891 (26 Stat. 769), provides that no purchase of steel shall be made by the War Department "until the same shall have been submitted to public competition * * * by advertisement." Section 1 of the Act of March 3, 1893 (27 Stat. 732), provides for the submission to public competition of all contracts for gun steel or armor for the use of the Navy, and the Act of June 30, 1914 (38 Stat. 398), makes similar provision in reference to purchases of shells and projectiles for the Navy. Other provisions mentioned in the margin are applicable to particular branches of the Government and relate to specified articles. Many of the provisions require not only that purchases shall be made after "due legal advertising," but that they shall be made from the "lowest and best bidder."

¹ See United States Compiled Statutes, 1916, secs. 114, 115, 1982, 1985, 4040, 6832, 6833, 6835, 6837, 6841, 6843, 6845, 6847, 6848, 6849, 6852, 6856, 6860, 6861, 6862, 6867, 6868, 6872, 6875, 6919, 6959, 7424, 7425, 7435, 8428.

While it may be that no one of these provisions relates to the railroads, telephones and telegraphs, they embrace all of the older establishments of the Government, and amply demonstrate the general purpose of Congress that the purchase of Government supplies shall be based on competitive bidding.

I am of opinion, therefore, that the proposed plan of the Industrial Board of the Department of Commerce, viewed in any aspect, is unauthorized by law.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF COMMERCE.

NAVAL OFFICERS—PROMOTION—CONSTRUCTIVE PARDON.

The promotion of an officer of the Navy while under charges awaiting trial by general court-martial does not operate as a constructive pardon of the offenses charged against him.

Where an ensign in the Navy, while under charges general in their nature and not peculiar to his office of ensign, was commissioned a lieutenant, and was thereafter found guilty of such charges by a general court-martial and sentenced to be dismissed from the service, the Secretary of the Navy was authorized by the law in mitigating his sentence with reference to the grade in which he was permanently serving.

DEPARTMENT OF JUSTICE,

April 4, 1919.

SIR: I have the honor to acknowledge the receipt of your letter of March 13 requesting my opinion on the following questions of law arising in the administration of your Department:

“(a) Does the promotion of an officer of the Navy while under charges awaiting trial by general court-martial operate as a constructive pardon of the offenses charged against him?”

“(b) If so, is it necessary for such officer, when later brought to trial by general court-martial for such offenses, to bring the fact of such promotion to the attention of the court-martial, by special plea or otherwise, in order to have the proceedings of the court-martial set aside by the reviewing authority, or is it sufficient if the fact of

such promotion is placed in the records of the case, after trial but before final action is taken by the reviewing authority?"

From the accompanying letter of the Judge Advocate General it appears that the specific case before you out of which the above questions arise is as follows:

Prior to September 21, 1918, Horace Roy Whittaker was an ensign in the United States Navy. On that date charges were preferred against him of "Absence from station and duty without leave" and "Conduct to the prejudice of good order and discipline." On October 25, while these charges were pending, he was commissioned temporarily a lieutenant (junior grade) from September 21, the commission stating that it was issued in accordance with the provisions of the act of May 22, 1917, 40 Stat. 84, as amended by the act of July 1, 1918, 40 Stat. 714. On October 30 he was placed on trial on the afore-said charges before a general court-martial, found guilty by his own plea, and sentenced to be dismissed from the service. On January 3 following, the Judge Advocate General reviewed the proceedings of the court-martial and recommended that they be set aside for the reason that by the well-settled rule of the Navy Department the commission operated as a constructive pardon of the charges pending before the court-martial. This recommendation was, however, disapproved by you, the sentence of the court-martial approved, but mitigated to the loss of 10 numbers in the grade in which Whittaker was permanently serving.

After a careful investigation, no authority has been found for the possibility or validity of an implied pardon except the opinions of Attorney General Cushing in 6 Op. 123, and 8 Op. 237, and the opinion of Attorney General Legare in 4 Op. 8. The former rest entirely on the authority of the latter, without reasoning. The latter with a like lack of reasoning relies entirely on Sir Walter Raleigh's Case, 2 Rolle's Reps. 50. In that report of the case it is said that the Chief Justice, while holding that there could be no implied pardon of treason (the case before him), remarked that perhaps it might be different

in felony. In the report of the same case in 2 Howells State Trials, 1, 34, no such remark is given, the Chief Justice merely stating:

“* * * for by words of a special nature, in case of treason, you must be pardoned and not implicitly. There was no word tending to pardon in all your commission; and therefore you must say something else to the purpose.”

A pardon by implication is not noticed in such authoritative English treatises as Hawkins (Pleas of the Crown, vol. 2, p. 542 *et seq.*), Blackstone (vol. 4, pp. 400, 401). Chitty (Criminal Law, vol. 1, p. 770 *et seq.*), Halsbury (Laws of England, vol. 6, p. 404). These writers are in accord in mentioning only absolute or full, and conditional, pardons. The American writers add partial pardons—in the nature of commutation of sentence—but none mentions an implied pardon except American and English Encyclopædia. (See e. g. Bishop, Criminal Law, vol. 1, sec. 914; Wharton, Criminal Procedure, 10th edition, vol. 2, secs. 1458–1474; Cyc., vol. 29, p. 1560.) In American and English Encyclopedia (vol. 24, p. 552), where implied pardons are mentioned, no authorities are cited but the opinions of Attorney General Cushing, *supra*, and of implied pardons it is said:

“* * * these, however, have been of very rare occurrence and are somewhat anomalous in their character.”

No decision has been found either in the Federal or the State courts recognizing or even mentioning an implied pardon. On the other hand, the uniform tenor of the decisions is inconsistent with their legal possibility. The Constitution of the United States confers upon the President “power to *grant* pardons for offenses against the United States,” thus assimilating a pardon to an express grant by deed, and the general constitutional provision is of this character. This was but an adoption of the English rule that a pardon was a grant under the great seal. Even an instrument in effect granting a pardon under the sign manual of the King was not sufficient. (*Bullock v. Dodds*, 2 B. & Ald. 258, 277; *Gough v. Davies*, 2 Kay & Johns. 623, 627.) Accordingly all the courts in this coun-

try, construing the constitutional provision, hold that a pardon is an express act of the Executive or legislature evidenced by something in the nature of a formal grant. In *United States v. Wilson* (7 Pet. 150, 160, 161), the court said:

"A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended * * *."

This definition is approved by the court in *Burdick v. United States* (236 U. S. 79, 89, 90), where an acceptance of a pardon was held essential. Clearly this definition refers to an express act of the Executive, having his mind directed to a certain offense and consciously willing an exemption from the consequences of it. In *Ex parte Wells* (18 How. 307, 310), the court said:

"Such a thing as a pardon without a designation of its kind is not known in the law. Time out of mind, in the earliest books of the English law, every pardon has its particular denomination. They are general, special, or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course."

In *Commonwealth v. Halloway* (44 Pa. St. 210), as preliminary to a holding that a pardon must be delivered, the court pointed out its distinction from a commission to office such as is claimed by the Attorneys General, *supra*, to work a pardon. A commission is but the seal of approval upon former considered, effectual, legal acts, and therefore needs no delivery for its operation. A pardon is an act of grace having no legal antecedents to the formal grant, and needing therefore assent by the grantee to make it complete. This view is accepted by Judge (afterwards Justice) Blatchford in *Matter of de Puy*, 3 Ben. 307, 319-322, and he calls attention to the fact that Marshall, Chief Justice, delivered the opinion of the court in *Marbury v. Madison* (1 Cranch 137), as well as in *United States v. Wilson* (7 Pet. 150), thereby recognizing and as-

serting the fundamental distinction between a commission and a pardon, viz, that the former is unilateral, requiring only the completed action of the appointing power, while the latter is bilateral, a meeting of the minds of the parties concerned being essential. This view of the nature of a pardon—clearly excluding an implied pardon—is evidently the basis of the decision of the court in *Burdick v. United States*, *supra*.

That a pardon is an express act based upon an intent directed to the particular offense and the reasons excusing it with a will to wipe out the punishment therefor, is also shown by the decisions that a pardon granted through fraud or misapprehension, the executive not being apprised of the true situation, is void;¹ that a pardon not clearly directed to the specific offense which it is claimed to cover is not effective as to that offense;² that a pardon varying only in a slight degree in its recitals from the truth, or expressed in clear but inartificial terms, is good.³ It is safe to say that these cases would all have been differently treated both by counsel and by the court had anyone suspected that a right to a pardon could accrue from mere implication out of general circumstances beyond the record.

If a pardon by implication were held to be within the pardoning power as known to the common law and adopted in the several constitutions, the result would be that, in every case where it was pleaded or set up, an issue of fact would be necessary and a consequent inquiry into the actions of the Executive or the legislature, the inferences of fact to be drawn therefrom, whether the subject acted in reliance on them and to what extent, with many other matters of a similar nature, all unfitting, even dangerous considerations in the determination of the im-

¹ *State v. Leak*, 5 Ind. 359; *State v. McIntire*, 1 Jones Law (N. C.) 1; *Commonwealth v. Holloway*, *supra*.

² *Stetler's Case*, 1 Phila. 305, 306; *Ex parte Higgins*, 14 Mo. App. 601; *State v. Foley*, 15 Nev. 64, 70-72; *Hawkins v. State*, 1 Porter (Ala.) 475; *State v. McCarty*, 1 Bay (S. C.) 334; *Ex parte Welmer*, 8 Biss. 321.

³ *Jones v. Harris*, 1 Strob. Law (S. C.) 160, 162; *Hoffman v. Coster*, 2 Whart. (Pa.) 453, 468; *Hester v. Commonwealth*, 85 Pa. St. 139, 154; *Lee v. Murphy*, 22 Gratt. (Va.) 789, 799, 800; *Redd v. State*, 65 Ark. 475, 484, 485; *Hunnicut v. State*, 18 Tex. App. 498, 521.

portant question of public law, viz, whether an amnesty has been duly granted for an offense against the laws of the State. Nor would the offender have anything definite to show as his title to his freedom from punishment, open to all the world—a matter of considerable though lesser importance.

I have therefore reached the conclusion that a pardon by implication or construction is a thing not known to or recognized by the law, and I answer your first question in the negative. This makes an answer to your second question unnecessary.

To apply the above ruling to the facts of the case, it is necessary to go a step further. Whittaker was an ensign when the charges were filed against him—September 21. It is true that his commission, although not issued until October 25, recited that he was temporarily appointed a lieutenant from September 21. Such retroaction, however, while it might affect his rank and pay (*United States v. Vinton*, 2 Sumner 299), could not affect his actual status before the court-martial (29 Op. 254, 257). When sentence was pronounced, however—October 30—his commission had become effective for all purposes within its legal scope and his office of lieutenant had vested, acceptance, and execution of the oath not being necessary to this result (*Marbury v. Madison*, 1 Cranch 137).

If his appointment as lieutenant had been *permanent*, displacing for all purposes his office of ensign, there would be reason to claim that in law either the sentence of the court-martial was void or it was incapable of execution. In 4 Op. 8, Attorney General Legare had a case of this character before him, and while he held that the commission was an implied pardon his opinion really rested on a sounder basis. The officer, while a passed midshipman, had been suspended for two years, and the sentence had been approved and executed. Subsequently he was commissioned a lieutenant. The Attorney General said:

“I do not see how the sentence applies to the present rank of Lieutenant Hooe. The judgment of the court was, that Passed Midshipman Hooe should be suspended from his office of midshipman. But he ceased to be a midship-

man by his appointment to a higher office, and his acceptance of it. If he is a lieutenant at all, it is because the grant of the office took effect immediately, *non obstante* the suspension; and so it unquestionably did, and, *taking effect, it was a resignation or merger of the commission*. Then, how could a sentence, of which the only effect was to deprive him for a time of his rank and emoluments as a midshipman, have any effect upon an office which he acquired after the sentence was passed; and, by acquiring which, he ceased *ipso jure* to hold the office to which alone the sentence related? * * *."

"But, even supposing the sentence of the passed midshipman might, by possibility, be made applicable to the lieutenant; how could it be enforced? * * * The sentence passed upon the offender was suspension from a passed midshipman's rank and pay; it is now become, by the act of Government itself, impossible to enforce that judgment, because the officer is no longer entitled to that rank and pay, but by those conferred by a higher commission. * * *"

Assuming these views to be sound, they would be applicable to the present case, *provided* Whittaker had been *permanently* appointed a lieutenant. In that case the Ensign Whittaker would have ceased to exist to the same extent in law as though he had died, and the court-martial proceedings would have been void for lack of jurisdiction *in personam*.

Does the same conclusion follow as to a temporary appointment made under the provisions of the act of May 22, 1917, as amended, *supra*? It would seem not. Such appointments are referred to throughout the act as "temporary," being carefully distinguished from "permanent" appointments. They are to "continue in force" only until a certain period (sec. 8), and it is expressly provided:

"That the permanent * * * commissions * * * of officers shall not be vacated by reason of their temporary advancement or appointment, nor shall said officers be prejudiced in their relative lineal rank as to promotion * * *."

"That upon the termination of temporary appointments in a higher grade or rank as authorized by this Act the officers so advanced * * * shall revert to the grade, rank, or rating from which temporarily advanced, unless such officers * * * in the meantime, in accordance with law, become entitled to promotion to a higher grade or rank in the permanent Navy * * * in which case they shall revert to said higher grade or rank * * *." (Sec. 7, 40 Stat. 86.)

The situation is similar to the detail of a line officer to the staff, with higher rank and pay. This does not disturb his office in the line, and, on the termination of his staff duties, he reverts automatically to his old office.

The opinion of Attorney General Legare does not, therefore, apply; the difference in the effect of a permanent, as distinguished from a temporary, appointment to a higher office being fundamental. Whittaker was still an ensign when the court-martial acted on his case, and when you revised it, the office being merely in abeyance for a definite time. The offenses charged against him, viz, "absence from station and duty without leave" and "conduct to the prejudice of good order and discipline," were general in their nature and not peculiar to his office of ensign nor rendered meaningless by his temporary promotion. You evidently took this view in mitigating the sentence with reference to "the grade in which he is permanently serving," and, in my opinion, your action was within the law.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE NAVY.

PHILIPPINE GOVERNMENT—ISSUANCE OF CERTIFICATES OF INDEBTEDNESS.

Certificates of indebtedness in the sum of \$10,000,000 par value which the Government of the Philippine Islands proposes to issue to maintain the required parity between the silver and the gold peso and to meet an emergent exchange situation, as provided by an act of Congress of March 2, 1903, and also by an act of the Philippine Legislature of May 6, 1918, will, if and when issued

NOTE.—Opinion of April 11, 1919, relating to reinstatement of former Government employees, p. 449.

in the form and under the conditions herein stated, be the valid obligations of the Philippine Government.

DEPARTMENT OF JUSTICE,

April 9, 1919.

SIR: I have the honor to acknowledge the receipt of your letter of April 8 requesting my opinion as to the validity of a proposed issue by the Government of the Philippine Islands of certificates of indebtedness in the amount of \$10,000,000 par value under the authority of the Act of Congress of March 2, 1903 (32 Stat. 952, 953).

Said Act established the gold standard in the Philippine Islands, fixing as the unit of value the gold peso of a certain weight and fineness. In order to maintain the parity between the gold standard and the coinage of silver and other metals authorized by the Act, it was provided in section 6 as follows:

“ * * * and the government of the Philippine Islands may adopt such measures as it may deem proper, not inconsistent with said Act of July first, nineteen hundred and two, to maintain the value of the silver Philippine peso at the rate of one gold peso, and in order to maintain such parity between said silver Philippine pesos and the gold pesos herein provided for, and for no other purpose, may issue temporary certificates of indebtedness, bearing interest at a rate not to exceed four per centum annually, payable at periods of three months or more, but not later than one year from the date of issue, which shall be in the denominations of twenty-five dollars, or fifty pesos, or some multiple of such sum, and shall be redeemable in gold coin of the United States, or in lawful money of said islands, according to the terms of issue prescribed by the government of said islands; but the amount of such certificates outstanding at any one time shall not exceed ten million dollars, or twenty million pesos, and said certificates shall be exempt from the payment of all taxes or duties of the government of the Philippine Islands, or any local authority therein, or of the Government of the United States, as well as from taxation in any form by or under any State, municipal, or local authority in the United

States or the Philippine Islands: *Provided*, That all the proceeds of said certificates shall be used exclusively for the maintenance of said parity, as herein provided, and for no other purpose, except that a sum not exceeding three million dollars at any one time may be used as a continuing credit for the purchase of silver bullion in execution of the provisions of this Act."

Exercising the discretion conferred by this Act, the Philippine Government created a "Gold standard fund" (Compilation of Philippine Commission, 1907, ch. 194; Administrative Code of Philippine Islands, ch. 41, Art. VII), now called the "Currency reserve fund," the purpose of which was to maintain the required parity (partly by the purchase and sale of exchange), and which was maintained *inter alia* by the proceeds of the sale of certificates of indebtedness authorized by the act of March 2, 1903.

On May 6, 1918, the Philippine Legislature, by act No. 2776, amended Article VII of the Administrative Code by providing, in so far as material to the present question, as follows:

"The currency reserve fund shall not at any time be less in amount than the nominal value of the Treasury certificates in circulation or available for circulation, plus fifteen per cent of the money of the Government of the Philippine Islands in circulation and available for circulation, exclusive of the silver certificates in circulation protected by a gold reserve, and if at any time, and for whatever reason, it shall fall below the limit herein fixed, the amount necessary to bring it up to the required minimum shall be considered automatically appropriated out of any funds in the Insular Treasury not otherwise appropriated, and shall be transferred by the Insular Treasurer to the currency reserve fund, under rules and regulations issued by the Secretary of Finance and approved by the Governor-General: *Provided*, That amounts temporarily invested in silver bullion or advanced for the purchase of same for coinage into Philippine currency, may lawfully be counted as part of said fund: *And provided, further*, That in case a transfer of general funds to the currency reserve fund

is inadvisable, the Governor-General, with the consent of the presiding officers of both Houses of the Legislature, may order temporary certificates of indebtedness issued within the conditions of section six of the act of Congress of March second, nineteen hundred and three, entitled 'An Act to establish a standard of value and to provide for a coinage system in the Philippine Islands,' and the proceeds of such certificates of indebtedness shall become part of the currency reserve fund and shall be used exclusively for the purposes of said fund."

You state that in order to maintain the required parity and to meet an emergent exchange situation, the Philippine Government proposes to issue and sell, under the authority of the above Philippine Act of May 6, 1918, as well as under the authority of the above Act of Congress of March 2, 1903, \$10,000,000 par value of certificates of indebtedness. You inclose a copy of a cablegram from the Acting Governor General of the Islands which reads as follows:

"To-day the undersigned as Acting Governor General with the consent of the acting president of the senate and the speaker of the house of representatives has issued in writing and deposited in the archives an executive order under the provisions of act No. 2776, based on section 6 of the act of Congress March 2, 1903, reciting that a transfer of general funds to the currency reserve fund of the insular treasury and its branches is inadvisable, and by which it was duly ordered that temporary certificates of indebtedness of the Government of the Philippine Islands for \$10,000,000 be issued, following forms previously adopted, within the conditions of section 6 of said act of Congress, bearing interest from April 1, 1919, at the rate of 4 per cent per annum due March 31, 1920, and of such denominations and interest paying periods as may with the place of payment be fixed by the Bureau of Insular Affairs, which is in such executive order empowered and requested to issue and negotiate said temporary certificates of indebtedness and to use the proceeds thereof for the purposes set forth in said act No. 2776."

YEATER.

It is shown by the above statement of the Acting Governor General that the conditions necessary to make effective the grant of authority contained in section 1624 of the Act of May 6, 1918, have been complied with. The only questions therefore are whether the Act of May 6, 1918, was a valid exercise of power on the part of the Philippine Legislature, and, if so, whether the draft of the proposed certificates inclosed by you complies with the provisions of section 6 of the Act of Congress of March 2, 1903.

1. It is assumed that the act of May 6, 1918, received the express or implied approval of the President of the United States as required by section 10 of the organic act of August 29, 1916 (39 Stat. 548).

Section 6 of the Act of Congress of March 2, 1903, provided that "*the government of the Philippine Islands* may issue temporary certificates of indebtedness" within the limitations therein prescribed. There is nothing in this language, however, which prevents a delegation by the Philippine Legislature to competent officials of the power to determine whether the reserve fund should, as a matter of sound finance, be maintained by transfer from the general funds or by sale of certificates, and, if by the latter means, the amount of certificates necessary for this purpose. Such matters are of the character of administrative details which may legally be delegated. The procedure does not differ from that adopted by Congress under similar conditions in 1875 (act of Jan. 14, 1875, 18 Stat. 296) and in 1900 (act of Mar. 14, 1900, 31 Stat. 46).

2. The draft of certificate attached recites that the Government of the Philippine Islands is indebted to bearer in the sum of \$10,000, is dated April 1, 1919, to mature March 31, 1920, bears interest at the rate of 4 per cent per annum, and is payable in gold coin of the United States. It therefore complies in its formal aspects with the requirements of the act of March 2, 1903.

You state that there are at present no outstanding certificates of indebtedness of the Philippine Government, so that the proposed issue will not cause the limit fixed by the statute to be exceeded.

It is my opinion, therefore, that these certificates, if and when issued in the form and under the conditions stated, will be the valid obligations of the Philippine Government.

Respectfully, yours,

A. MITCHELL PALMER.

To the SECRETARY OF WAR.

ADMISSION TO ST. ELIZABETHS HOSPITAL OF INSANE
PATIENT OF THE BUREAU OF WAR RISK INSURANCE.

Curtis M. Berry, an enlisted man who had served some time in the United States Army and who was discharged therefrom because of his insanity, was properly admitted to St. Elizabeths Hospital upon the order of the Secretary of the Treasury as an insane patient of the Bureau of War Risk Insurance.

The hospital service to which Berry was entitled is included in the purposes for which appropriations are made for the use of war risk insurance, and the cost of the same should be paid out of these appropriations.

The only provision for a judicial inquiry into the mental status of any persons previous to their admission to St. Elizabeths Hospital is in the case of indigent persons residing in the District of Columbia, and as Berry does not come within this class, no such judicial inquiry is necessary in his case.

DEPARTMENT OF JUSTICE,

April 14, 1919.

SIR: I am in receipt of your letter requesting an opinion as to the status of one Curtis M. Berry, now in St. Elizabeths Hospital. It is stated that this man, formerly a private in Battery D, One hundred and thirty-fourth Field Artillery, United States Army, was admitted to that institution on the order of the Secretary of the Treasury as an insane patient of the Bureau of War Risk Insurance after he had been discharged from the Army because of his insanity.

The questions submitted are:

- (1) Could Berry's admission to that hospital be legally ordered by the Secretary of the Treasury?
- (2) From what funds should the cost of his treatment in that institution be paid?
- (3) Can he be legally retained in that hospital until after his mental status has been first adjudicated in the courts of the District of Columbia?

The hospital in question was established in 1855 as the "Government Hospital for the Insane." The name was afterwards changed to "Saint Elizabeths Hospital" by the act of July 1, 1916 (39 Stat. 309). Its objects are stated to be "the most humane care and enlightened curative treatment of the insane of the Army and Navy of the United States and of the District of Columbia." Subsequent acts, however, have made provision for the admission of other persons than those above indicated. Its primary object, however, remains the care and treatment of the insane of the Army and Navy. Without reviewing all the acts on the subject, it is sufficient to say that whenever provision has been made for the admission of patients at the instance of Departments other than the Army and the Navy it has been provided that such admission should be upon the order of the head of the appropriate Department.

The War Risk Insurance Act contains these provisions:

"Sec. 300. That for death or disability resulting from personal injury suffered or disease contracted in the line of duty, by any commissioned officer or enlisted man * * * the United States shall pay compensation as hereinafter provided; but no compensation shall be paid if the injury or disease has been caused by his own willful misconduct: *Provided*, That for the purposes of this section said officer, enlisted man, or other member shall be held and taken to have been in sound condition when examined, accepted, and enrolled for service." (40 Stat. 611.)

"Sec. 302. (3) In addition to the compensation above provided, the injured person shall be furnished by the United States such reasonable governmental medical, surgical, and hospital services and with such supplies, including artificial limbs, trusses, and similar appliances, as the director may determine to be useful and reasonably necessary: * * *." (40 Stat. 406.)

And since the term "injury" as defined in another paragraph of the Act has included diseases, it can not be doubted that insanity is included. The Bureau of War Risk Insurance would therefore seem under obligation to furnish this man necessary hospital service. It is stated, however, that the records of the War Office in connection

with his discharge show that his insanity existed prior to his enlistment. I think, however, this is not important, for the reason that, as shown above, for the purpose of determining the right of an enlisted man to compensation, he shall be held and taken to have been in sound condition when examined, accepted, and enrolled for service. As this man was accepted and served for some time, I am of opinion that he was entitled to the necessary hospital service. The Secretary of the Treasury is the head of the Department of which the Bureau of War Risk Insurance is a part, and I am of opinion that Berry was properly admitted to the institution in question upon his order.

In answer to the second question, the hospital service to which Berry was entitled is included in the purposes for which appropriations are made for the use of war risk insurance, and the cost of the same should be paid out of these appropriations.

In answer to the third question, the only provision for a judicial inquiry into the mental status of any persons previous to their admission to the hospital is in the case of indigent persons residing in the District of Columbia. Berry does not come within this class, and hence no such judicial inquiry is necessary in his case.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE INTERIOR.

EXPLORATION FOR AND DISPOSITION OF POTASSIUM ON
PUBLIC LANDS IN NATIONAL FORESTS.

The Act of October 2, 1917 (40 Stat. 297), authorizing exploration for and disposition of potassium, applies to public lands reserved as national forests.

DEPARTMENT OF JUSTICE,

April 16, 1919.

SIR: A disagreement having arisen between your Department and the Department of the Interior as to whether the Act of Congress "to authorize exploration for and disposition of potassium," approved October 2, 1917 (40 Stat. 297), applies to national forest lands, you requested the opinion of the Attorney General on this question by letter

of September 13, 1918, and the Secretary of the Interior has joined in the request.

The Act in question authorizes the Secretary of the Interior, under such rules and regulations as he may prescribe, to issue permits for a period not to exceed two years to prospect for various specified forms of potassium "on public lands of the United States," in areas not to exceed 2,560 acres in compact form. (Sec. 1.) Upon showing to the satisfaction of the Secretary of the Interior during the term of the permit that valuable deposits of potassium have been discovered within the permitted area, the permittee is entitled to a patent for not to exceed one-fourth of such area and the remainder is subject to lease by the Secretary of the Interior, under appropriate rules and regulations and in such areas as he may fix, upon a royalty of not less than 2 per cent of the gross value of the output and an advance yearly rental of 25 cents per acre for the first year, 50 cents per acre for the second, third, fourth, and fifth years, and not less than \$1 per acre for each succeeding year, the leases to be for indeterminate periods, subject to readjustment of terms and conditions determined by the Secretary of the Interior at the end of each 20-year period. (Sec. 2.) During the life of any permit or lease the Secretary of the Interior is authorized to lease an additional 40 acres of "unoccupied nonmineral public land" to the permittee or lessee for camp sites, refining works and other purposes of development and use of the deposits. (Sec. 3.) Any permit is subject to cancellation by the Secretary of the Interior for failure of the permittee to exercise due diligence in the prosecution of prospecting work. (Sec. 4.) The surface of the leased lands not necessary for use in extracting and removing the deposits of potassium may be reserved for other disposition. (Sec. 6.) "Each lease shall contain provisions deemed necessary for the protection of the interests of the United States" and "for the safeguarding of the public welfare." (Sec. 7.) The leases are subject to judicial cancellation for failure to comply with any of the provisions of the act, of the lease, or of the general regulations in force at the date of the lease. (Sec. 8.) The act applies "to all deposits of potassium salts in the lands of the United States which

may have been or may be disposed of under laws reserving to the United States the potassium deposits." (Sec. 9.) "The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act." (Sec. 11.) And "the deposits herein referred to, in lands valuable for such minerals, shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws." (Sec. 12.)

The statute expressly applies to "public lands of the United States," and the question is whether that description was intended to include national forest lands. The term "public lands" is habitually used in the legislation of Congress to designate such lands as are subject to sale or other disposal under general laws. But it is also sometimes used in the larger sense of lands reserved for specific public purposes, and the intention so to use it may result from a consideration of the scope and purpose of the entire act, its effect on the preexisting law, and the circumstances attending its passage. (*Kindred v. Union Pacific R. R. Co.*, 225 U. S. 582, 596; *Union Pacific R. R. Co. v. Harris*, 215 U. S. 386, 388; *United States v. Blendaur*, 128 Fed. 910, 913.) The term is also properly used in its restricted sense to describe lands which are subject to sale and disposal under a certain general law though not under others.

Under the law relating to public lands reserved as national forests at the time of the passage of the act in question such reservations could not lawfully include lands more valuable for mineral than for forest purposes, and such forest lands were open to exploration and acquisition under the general mining law. (Act June 4, 1897, 30 Stat. 35, 36.) By that law (Rev. Stat. Title XXXII, Ch. VI) "all valuable mineral deposits in lands belonging to the United States" were "declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase." (Sec. 2319.) "All forms of deposit, excepting veins of quartz, or other rock in place," were made "subject to entry and patent" as

placer claims by associations of eight or more persons in tracts of 160 acres upon a discovery and proof of \$500 worth of labor or improvements on each tract, and payment of \$2.50 per acre. (Secs. 2329, 2330, 2333, 2325.) Potassium was recognized by the Land Department as a valuable mineral deposit, the public lands containing it were subject to entry and patent as placer mining claims, and there was no limit to the number of tracts that one association of eight or more persons might locate and acquire.

It is thus seen that the right to explore for potassium public lands reserved as national forests and the right to acquire such lands upon discovery for a nominal price were practically unlimited under the preexisting law. Application of the Potassium Act of 1917 to such national forest lands does not substantially enlarge those rights, but does restrict them in several important particulars. Instead of an unlimited right of exploration, such right is denied except as permitted by the Secretary of the Interior on tracts not exceeding 2,560 acres and for a period not exceeding two years. Instead of an unlimited right to patent after discovery for tracts of 160 acres, such right is restricted to a single area not exceeding 640 acres. The granting of leases to the remaining area is discretionary with the Secretary, and all leases must contain provisions for the protection of the interests of the United States and for the safeguarding of the public welfare. The Secretary is not required to issue any permit or lease or to adopt the maximum area in any case. Every right or privilege under the Act is subject to proper rules and regulations prescribed by him, and the regulations which he has prescribed evidence his appreciation of the necessity to protect the national forests and his intention to act in co-operation with the Secretary of Agriculture with respect to the extent of such necessity in each particular case.

The provision of section 12 that "the deposits herein referred to, in lands valuable for such minerals, shall be subject to disposition only in the form and manner provided in this Act," imports a repeal of the general mining law and a substitution of the new method of disposal

with respect to potassium, and unless such repeal and substitution were effective within the national forests we would have the curious anomaly of national forest lands open to unrestricted exploration and acquisition for their potassium deposits and ordinary public lands of like character subject to restrictive regulations. It can not be said that the mining law in this respect was repealed as to national forest lands and that the new system was not substituted therefor. The Act obviously applies to such lands in all respects or it does not apply to them in any.

The legislative history of the Potassium Act confirms the view that it was intended to apply to public lands reserved for national forest purposes. It was Senate bill 2156, and as introduced it applied to "public lands belonging to the United States." The committee in its report recommended the substitution of the words "lands of the United States not known to contain valuable deposits of the kinds above described." (S. Rept. 100, 65th Cong., 1st sess.) Objection to this amendment was made on the ground that the Act would thus be made to apply to national parks and lands purchased for watershed protection in the Appalachian region under the act of March 1, 1911 (36 Stat. 961). It was therefore amended by substituting for the words of the committee amendment the words of the Act "public lands of the United States." No specific reference was made to the effect of the Act on the public lands reserved for national forests, and the effect of the words adopted, as stated by Senator Nelson and accepted by the Senator in charge of the bill, was that "The term 'public land' has a well-defined meaning in the land laws of the United States. It means land that is open to public entry of some kind." (55 Cong. Rec. 5936.) This definition would include lands in national forests that were open to entry under the general mining law, but would not include lands in national parks or the Appalachian reserves, which were not subject to entry under any general law.

My conclusion is that the Potassium Act of 1917 applies to the public lands reserved as national forests.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF AGRICULTURE.

438 *Expenses Incurred in Securing Enemy Property.*

PAYMENT OF EXPENSES INCURRED IN SECURING POSSESSION OF ENEMY PROPERTY.

The Secretary of the Treasury may lawfully comply with the request of the Alien Property Custodian for the payment of the commission and fees incurred in securing possession of certain enemy trusts herein set forth, to the extent that money has been deposited in the Treasury of the United States to the credit of the respective trusts.

DEPARTMENT OF JUSTICE,
May 3, 1919.

SIR: In your letters of January 29, 1919, which you supplement by your letter of April 7, 1919, you called my attention to the fact that in August, 1918, the First National Bank of Rome, Ga., was appointed depository of a certain enemy trust; that as such it collected outstanding notes of the enemy amounting to \$13,648.45; that, under a schedule of compensation fixed by your predecessor it became entitled to a commission of 1 per cent thereupon; that the whole corpus of this enemy trust has been deposited in the Treasury; and that the depository has not been paid its commission.

You called my attention also to a similar case where your State counsel, Hon. Garret W. McEnerney, rendered services in procuring the receipt by you of certain enemy property and so became entitled to fees in accordance with the schedule adopted.

You ask me whether, if the Alien Property Custodian certifies that the commission and fees herein referred to have been properly incurred in securing the respective enemy trusts, the Secretary of the Treasury is required to deliver bonds or withdraw money in the Treasury to meet the expenses so certified—to the extent of the money which has been deposited in the Treasury of the United States to the credit of the respective trusts. You ask me further whether the Secretary of the Treasury if not required so to do may lawfully comply with your request to the extent of the money deposited in the Treasury to the credit of the respective trusts.

Section 5 (a) of the Trading with the Enemy Act contains the following provision:

"and he (the President) may make such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act" (40 Stat. 415).

Section 3 (b) of the Executive order of February 26, 1918, provides:

"The Alien Property Custodian may pay all reasonable and proper expenses which may be incurred in or about securing possession or control of money or other property and in or about collecting dividends, interest, and other income therefrom, and in otherwise protecting and administering the same. So far as may be, all such expenses shall be paid out of, and in any event recorded as a charge against, the estate to which such money or other property belongs."

Section 5 (d) of the same Executive order provides in the last paragraph:

"Any and all moneys so deposited in the Treasury of the United States, as herein provided, together with any interest or income received from the investment thereof, shall be subject to withdrawal by the Secretary of the Treasury for the purpose of making any payment or payments pursuant to the provisions of said Act."

The words giving the Secretary of the Treasury power to withdraw money for making payments "pursuant to the provisions of this Act" are broad enough to cover a payment authorized by an order of the President issued under the authority of the Trading with the Enemy Act. This interpretation accords with the purpose shown by the Act to apply the same general policy to money deposited with the Treasury as is applied to property administered by the Alien Property Custodian. Both such money and such property are made the subject by the provisions of section 9 of the Trading with the Enemy Act to the claims of non-enemies and both such money and property are to be held after the war subject to the disposition of Congress as to enemy claims. It is to be presumed therefore that liability

440 *Expenses Incurred in Securing Enemy Property.*

for payment of expenses in collecting an enemy estate, which exists while money of the estate is in the hands of the Alien Property Custodian, should continue to exist after the money had been deposited with the Treasury.

A further ground for the interpretation here given is found in the requirement of section 12 of the Trading with the Enemy Act that money received by the Alien Property Custodian "shall be deposited forthwith in the Treasury of the United States." Since money can not be retained by the Alien Property Custodian until an estate is fully administered, numerous cases are likely to arise where it will not be possible to determine all the expenses which have been incurred, until after all the money of the estate has been deposited in the Treasury. The President's order should be construed so as to grant relief in such a situation.

It does not appear that the Secretary of the Treasury has as yet been requested to make the payment referred to in your letters of January 29, 1919, and April 7, 1919. The question is not now presented whether payment of these expenses shall be made by the delivery of bonds or by the withdrawal of money in the Treasury. Since the Secretary of the Treasury has not refused any request as to these payments, the question whether he is required to make these payments has also not arisen. No opinion is expressed on these two questions.

I am of the opinion that the Secretary of the Treasury may lawfully comply with your request for the payment of the expenses set forth in your letters of January 29, 1919, and April 7, 1919, to the extent that money has been deposited in the Treasury of the United States to the credit of the respective trusts.

Respectfully,

ALEX. C. KING,
Acting Attorney General.

To the ALIEN PROPERTY CUSTODIAN.

INCOME TAX—SALARIES AND WAGES OF STATE OFFICIALS
AND EMPLOYEES.

The salaries and wages of State officials and employees are not subject to the income tax imposed by the Revenue Act of 1918, approved February 24, 1919 (40 Stat. 1057).

DEPARTMENT OF JUSTICE,

May 6, 1919.

SIR: I have the honor to acknowledge receipt of a letter from the Acting Secretary of the Treasury, dated April 18, 1919, asking for an opinion as to whether the salaries of State officials and the salaries and wages of employees of a State are liable to the income tax imposed by the Revenue Act of 1918, approved February 24, 1919 (40 Stat. 1057). The letter is accompanied by the opinion of the Solicitor of Internal Revenue, to the effect that such salaries and wages are not subject to the tax in question.

In my opinion the Solicitor of Internal Revenue has reached the correct conclusion. This conclusion rests upon the well-settled rule that the governmental agencies of the States are not subject to taxation by the Federal Government, just as the governmental agencies of the Federal Government are not subject to taxation by the States. *Collector v. Day*, 11 Wall. 113; *Pollock v. Farmers' Loan & Trust Company*, 157 U. S. 429; *McCulloch v. Maryland*, 4 Wheat. 316, 427; *Dobbins v. Commissioners of Erie County*, 16 Pet. 435.

The Act in question provides that the taxable income shall include, among other things, gains, profits, and income derived from salaries, wages, or compensation for personal service. It does not specifically mention, by way either of inclusion or exclusion, salaries or wages of State officials or employees. Since, however, there can not be any doubt that such wages and salaries are beyond the taxing power of Congress, it can not be assumed that they were intended to be included under the general head of wages and salaries mentioned in the Act. The Act must be construed as applying only to such wages and salaries as can be constitutionally taxed by the Federal Government.

I am therefore of opinion that they are not subject to the tax imposed by the Act in question.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.

TAX ON THE MANUFACTURE AND SALE OF BEER.

Where beer has been manufactured and withdrawn for sale in violation of the Food Control Act (40 Stat. 276), and the regulations thereunder, the tax imposed thereon by section 608 of the revenue act of February 24, 1919 (40 Stat. 1109), may be lawfully collected and it is the duty of the proper officer to collect it, as the liability for this tax does not depend upon whether such manufacture and sale are legal or illegal.

The tax imposed by section 608 of the revenue act, *supra*, should be collected on all beer containing one-half of one per centum, or more, of alcohol manufactured and sold after May 1, 1919.

Sections 3340 and 3354 of the Revised Statutes authorize seizure and forfeiture proceedings only for violations of the revenue laws and, if the revenue laws are complied with, these sections will not apply to cases of violation of either the Food Control Act or the Act of November 21, 1918 (40 Stat. 1146).

DEPARTMENT OF JUSTICE,

May 7, 1919.

SIR: I have the honor to acknowledge receipt of your letter of April 8, asking for an opinion on the following questions:

(1) "May the tax imposed by section 608 of the revenue act of 1918 be lawfully collected on beer manufactured and withdrawn for sale in violation of regulations issued by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury under the authority of the Executive order of the President of the United States under the Food-Control Act of August 10, 1918?"

(2) "May the tax imposed by section 608 of the revenue act of 1918 be lawfully collected on beer containing one-half of one per cent or more of alcohol by volume manufactured and sold after May 1, 1919, in view of the provisions of the act of November 21, 1918?"

(3) "May the powers of seizure and the institution of forfeiture proceedings provided for in sections 3340 and 3354, R. S., be exercised when beer has been manufactured and withdrawn for sale containing one-half of one per cent or more of alcohol by volume?"

An answer to these questions involves a consideration of the revenue act of 1918, approved February 24, 1919, the Food-Control Act of August 10, 1917, and the Act of November 21, 1918, which provides:

"After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes" (40 Stat. 1046).

Answering your first question, under the Food-Control Act and the proclamations of the President thereunder it is now unlawful to use grain or other materials in the manufacture of any intoxicating beverage. On the other hand, section 608 of the revenue act approved February 24, 1919 (40 Stat. 1109), is as follows:

"That there shall be levied and collected on all beer, lager beer, ale, porter, and other similar fermented liquor, containing one-half of one per centum, or more, of alcohol, brewed or manufactured and hereafter sold, or removed for consumption or sale, within the United States, by whatever name such liquors may be called, in lieu of the internal revenue taxes now imposed thereon by law, a tax of \$6.00 for every barrel containing not more than thirty-one gallons, and at a like rate for any other quantity or for the fractional parts of a barrel authorized and defined by law, to be collected under the provisions of existing law."

Liability for this tax does not depend upon whether the manufacture and sale are legal or illegal. The manufacture of beer containing as much as one-half of 1 per cent of alcohol may be unlawful under the Food-Control Act and the President's proclamations. But if, notwithstanding this prohibition, a brewer, in fact, manufactures

and sells such beer, he is liable for the tax imposed by section 608 above. The fact that he is subject to prosecution under the food law does not relieve him of liability for the tax. The result of the two laws is that he is both liable for the tax and subject to prosecution. I am therefore of the opinion not only that the tax may be lawfully collected but that it is the duty of the proper officer to collect it, where beer has been manufactured and withdrawn for sale in violation of the Food-Control Act and the regulations thereunder.

Answering your second question, the Act of November 21, 1918, makes it unlawful after May 1 next to use grain or other food products in the manufacture of "beer, wine, or other intoxicating malt or vinous liquor for beverage purposes." The meaning of this statute is now under consideration in a proceeding in which I am maintaining that the manufacture of beer or wine is absolutely prohibited, without regard to the amount of alcohol contained, or whether they are, in fact, intoxicating or nonintoxicating. If this contention is upheld by the courts, the manufacture after May 1, 1919, of beer containing one-half of 1 per cent or more of alcohol will undoubtedly be unlawful. If the courts construe the Act as prohibiting only the manufacture of beer which is, in fact, intoxicating, the manufacture of beer will then be lawful or unlawful according to whether it is intoxicating or nonintoxicating. The answer to your second question, however, will be the same in either event. The tax is laid on all beer containing as much as one-half of 1 per cent manufactured and removed for sale. Liability for the tax does not depend upon whether the manufacture is lawful or unlawful, and, for the reasons stated in answer to your first question, this tax should be collected on all beer containing one-half of 1 per cent of alcohol manufactured after May 1, 1919.

In answer to your third question, sections 3340 and 3354, Revised Statutes, authorize seizure and forfeiture proceedings only for violations of the revenue laws. If the taxes are paid and the revenue laws therefore complied with, these sections will not apply to cases of violation of either

the Food-Control Act (40 Stat. 276) or the act of November 21, 1918 (40 Stat. 1046).

Respectfully,

A. MITCHELL PALMER.

TO THE SECRETARY OF THE TREASURY.

ACCEPTANCE OF MEDALS, DECORATIONS, ETC., BY NAVAL OFFICERS.

By virtue of a provision of the Army appropriation act of July 9, 1918 (40 Stat. 872), the Department of State is justified in delivering to naval officers of the United States medals and decorations heretofore tendered to such officers through said Department by the Governments of nations concurrently engaged with the United States in the present war.

The words "medal or decoration," appearing in the provision above referred to, are used in their usual meaning and do not include such articles as bowls, cups, and photographs.

DEPARTMENT OF JUSTICE,

May 9, 1919.

SIR: I have the honor to acknowledge receipt of your letter of April 15, 1919, in which you request my opinion as to the construction of the following provisions of the Army appropriation act of July 9, 1918 (40 Stat. 872):

"That any and all members of the military forces of the United States serving in the present war be, and they are hereby, permitted and authorized to accept during the present war or within one year thereafter, from the Government of any of the countries engaged in war with any country with which the United States is or shall be concurrently likewise engaged in war, such decorations, when tendered, as are conferred by such Government upon the members of its own military forces; and the consent of Congress required therefor by clause eight of section nine of Article 1 of the Constitution is hereby expressly granted: *Provided*, That any officer or enlisted man of the military forces of the United States is hereby authorized to accept and wear any medal or decoration heretofore bestowed by the Government of any of the nations concurrently engaged with the United States in the present war."

In your letter you state that certain presents, decorations, and other things have heretofore been tendered through the Department of State by countries concurrently engaged with the United States in the present war and have been retained by the department under the provisions of the act of January 31, 1881 (21 Stat. 603, 604, c. 32), which is as follows:

"That hereafter any present, decoration, or other thing, which shall be conferred or presented by any foreign government to any officer of the United States, civil, naval, or military, shall be tendered through the Department of State, and not to the individual in person, but such present, decoration, or other thing shall not be delivered by the Department of State unless so authorized by act of Congress."

In view of these statutes you ask two questions as to the duty and responsibility of the State Department, namely:

(1) Is the Department justified in delivering to naval officers of the United States medals and decorations heretofore tendered to such officers through this Department by governments "of any of the countries engaged in war with any country with which the United States is * * * likewise engaged in war?"

(2) Does the term "medal or decoration," as contained in the quoted provisions of the act of July 9, 1918, cover all articles such as bowls, cups, and photographs, which have been or may be tendered by such foreign governments, or has this term a meaning limited and restricted to the usual sense in which the words "medal" and "decoration" are employed?

The answer to the first question depends upon the construction to be given the words "military forces" in the provision under consideration. While the term "military" is often used as applying exclusively to the Army it may be construed more broadly to include the Navy as well, where the context shows that it was used in that sense. In an unpublished opinion of November 17, 1906, construing the act of October 1, 1890 (26 Stat. 648), which authorized the arrest by civil officers of deserters from the military service of the United States, Attorney General Moody said:

"It is certain that in many instances in legal as well as ordinary literal uses "military service" is a comprehensive term and refers to both fighting branches of Government, the Navy as well as the Army"—

and the United States Supreme Court has in at least two cases used the word "military" as relating to both Army and Navy. (*United States v. Dunn*, 120 U. S. 249, 252; *United States v. Sweeny*, 157 U. S. 281, 284.)

The paragraph under consideration is one of twelve contained in the Army appropriation act of July 9, 1918, which deal with the subject of medals and decorations. The first nine paragraphs authorize the award of such medals and decorations by the United States to persons serving in any capacity with the Army. The tenth paragraph provides that American citizens who since August 1, 1914, have received "decorations or medals for distinguished service in the armies or in connection with the field service of those nations engaged in war against the Imperial German Government, shall, on entering the military service of the United States, be permitted to wear such medals or decorations." The eleventh paragraph is the one under consideration. The twelfth provides that the President "is authorized, under regulations to be prescribed by him, to confer such medals and decorations as may be authorized in the military service of the United States upon officers and enlisted men of the military forces of the countries concurrently engaged with the United States in the present war" (40 Stat. 872).

The repeated use in the last three paragraphs of such terms as "military service" and "military forces," terms which may be construed as referring to the Navy as well as to the Army, in the place of expressions in the first nine paragraphs which unmistakably restrict the application of the latter to the Army could not have been inadvertent and is significant. It should be noted, also, as tending to show the intention of Congress that the provisions of the first nine paragraphs are substantially embraced in the act of February 4, 1919, authorizing the award of medals and decorations by the United States to persons in the naval service, and that a bill "to permit American citizens to wear

medals or decorations received from certain foreign countries on entering the military or naval service of the United States, and for other purposes," was on July 15, 1918, tabled by the House without objection for the reason, as given by the member of the Military Affairs Committee in charge of the bill, that its provisions had been enacted in the Army appropriation act of July 9, 1918.

For reasons growing out of the organization and jurisdiction of the respective congressional committees, there was a reason why the legislation relating to the award by the United States of decorations to the personnel of the two branches of the service, involving the necessity of appropriations, should take the form of separate bills. But in enacting the provisions authorizing the acceptance of medals from the allied Governments, these considerations did not apply and so it was reasonable that broader language should be used, applicable alike to the Army and Navy.

It is true that where the language of a statute is plain the fact that the giving effect to that language may have undesirable consequences does not authorize departure from its literal meaning, but if the language of a statute is fairly susceptible of different meanings the consequences of a particular construction may be considered in determining which construction should be adopted. (22 Op. 363.) A construction should not be adopted which would bring about absurd results. Legislation of the character now under consideration should be liberally construed. (23 Op. 78.) In that opinion which dealt with the power to bestow medals of honor on persons who make signal exertions in endeavors to save life from the perils of the sea, the Attorney General said (p. 82) :

"Such statutes as these receive a liberal and not a strict or technical construction; and when the obvious reason or object of the law requires a more extended or less technical meaning of a word or words in order to effect the object of the law, such meaning may be given. And when the same reason applies equally to words in a more extended sense, such meaning may be given them, if not inconsistent with the language used."

Upon these principles the word "soldier," as used in a statute relating to pensions, was interpreted by the Attorney General to comprehend also sailors and marines. (19 Op. 586.)

The Navy Department has construed the provision under consideration ever since its enactment as applying to the naval forces of the United States. This construction has been acted upon not only by the officers of the Navy but by the President of the United States.

For the reasons above given I concur in this construction and therefore answer your first question in the affirmative.

I agree with the answer of the Solicitor of the State Department to your second question that the words "medal or decoration" are used in the provision under consideration in their usual meaning and do not include such articles as bowls, cups, and photographs.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF STATE.

**REINSTATEMENT OF FORMER GOVERNMENT EMPLOYEES
WHO ENTERED THE MILITARY SERVICE.¹**

The provision of the Act of February 25, 1919 (40 Stat. 1164), which authorizes the reinstatement of former Government employees who have been drafted or enlisted in the military service of the United States in the war with Germany, applies to an employee who held a temporary appointment and who had no permanent civil-service status at the time he entered such service. Upon reinstatement, he will occupy the same civil-service status that he occupied at the time he entered the military service.

Under the above provision, a Government employee, who was inducted into the military service and who thereafter was honorably discharged from such service, is entitled to be reinstated if he is qualified to perform the duties of his former position, and he is not deprived of his right to reinstatement by the fact that two members of his family are already in the classified service.

DEPARTMENT OF JUSTICE,

April 11, 1919.

SIR: You have recently referred to me a letter from the Civil Service Commission dated March 14, 1919, requesting

¹ Note.—This opinion was temporarily withheld from publication and later released.

of me the expression of my opinion as to whether the Act approved February 25, 1919 (40 Stat. 1164), confers upon it authority for the reinstatement of certain former Government employees. Said Act provides as follows:

"That all former Government employees who have been drafted or enlisted in the military service of the United States in the war with Germany shall be reinstated on application to their former positions, if they have received an honorable discharge and are qualified to perform the duties of the position."

The questions upon which my opinion is requested are:

1. Does this provision require the reinstatement of persons who were merely serving temporarily, and who had no permanent status in the service prior to their entrance into the military service?

2. Shall reinstatement under this provision be subject to the restriction contained in section 9 of the Civil-Service Act that, when there are already two or more members of a family in the public service in the grades covered by the act, no other member of such family shall be eligible for appointment to any of said grades?

The first question is raised by the following facts:

Louis L. Toyer was appointed temporarily as an assistant messenger at \$720 per annum in the office of the Surgeon General on April 17, 1918. On May 14, 1918, he entered the military service. He has since been honorably discharged. He now seeks reinstatement under the provisions of the Act above quoted.

Mr. Toyer is no doubt a former Government employee within the meaning of the Act. He has received an honorable discharge from the military service of the United States in which he has served during the war with Germany. Therefore he must be reinstated if he is in fact qualified to perform the duties of his former position. That he never had a permanent civil-service status is immaterial. For, by this act Congress clearly intended that no former Government employee, who had been called to the military service of his country in this war, regardless of what his civil-service status had been before enlistment,

should suffer, as regards that status, by reason of his response to that call.

Upon reinstatement Mr. Toyer will occupy the same civil-service status that he occupied at the time he entered the military service of the United States. That is, his appointment will continue only as long as shall be necessary to make a permanent appointment through the certification of eligibles, and he must be removed within 30 days after the receipt, by the appointing officer, of the commission's certificate, unless the commission either authorizes his retention in the service beyond that time, or he can, within that time, qualify himself for a permanent appointment. (Rule 8 of the Civil Service Rules.)

The second question arises under the following circumstances: Lester H. Reese was appointed to the position of messenger boy at \$400 per annum in the Pension Office, on August 7, 1908, and was subsequently promoted to the position of messenger at \$840 per annum. On August 31, 1918, he was dropped from the rolls of the Department, having been inducted into the military service. He was His right to reinstatement under the Act of February 25, 1919, and now seeks to be reinstated in his former position. His right to reinstatement under the act of February 25, 1919, would be clear were it not for the fact that his father is now employed as a skilled laborer in the Bureau of Engraving and Printing, and his brother is employed as a letter carrier in the Washington, D. C., post office.

The question arises whether, under these circumstances, his reinstatement would be in violation of section 9 of the Act of January 16, 1883 (22 Stat. 406), which provides that:

“Whenever there are already two or more members of a family in the public service in the grades covered by this act, no other member of such family shall be eligible to appointment to any of said grades.”

This question must be answered in the negative. Section 9 of the Act of January 16, 1883, applies only to an original appointment, not to the reinstatement of a former employee. The appointment of Reese was legal at the time it was made. The Act of February 25, 1919, restored to him

the status he occupied in the civil service at the time he entered the armed forces of the United States. That status can not be affected by the fact that while he was in the military service he became ineligible for an original appointment. He is not deprived of his right to be reinstated in his former position by the fact that two members of his family are already in the public service. Thus construed there is no inconsistency between the Act of January 16, 1883, and the Act of February 25, 1919; but if there were, the former would have to be regarded as repealed to the extent that it conflicts with the latter.

Respectfully,

A. MITCHELL PALMER.

To the PRESIDENT.

REINSTATEMENT OF FORMER GOVERNMENT EMPLOYEES
WHO ENTERED THE MILITARY SERVICE.¹

The provision of the Act of February 25, 1919 (40 Stat. 1164), which authorizes the reinstatement of former Government employees who have been drafted or enlisted in the military service of the United States in the war with Germany, is not limited to former employees of the War Department, but applies alike to former employees in any department of the Government.

The provision, *supra*, applies to former employees who entered the naval service or the Marine Corps as well as to those who entered the Army.

The provision includes all who were either drafted or who enlisted as privates, although they may have subsequently been commissioned as officers, and it also includes those who enlisted for the purpose of entering the officers' training camps and who were afterward commissioned, but it does not include those who were commissioned from civil life and without having previously enlisted for any purpose.

The provision applies only to those who were drafted while in the employ of the Government or who left Government employment for the purpose of enlisting.

DEPARTMENT OF JUSTICE,

April 14, 1919.

SIR: I have the honor to acknowledge receipt of your letter of April 8 transmitting a request by the members

¹ NOTE.—This opinion was temporarily withheld from publication and later released.

of the Civil Service Commission for an opinion with respect to a provision in the urgent deficiency act approved February 25, 1919 (40 Stat. 1164), which is as follows:

"That all former Government employees who have been drafted or enlisted in the military service of the United States in the war with Germany shall be reinstated on application to their former positions, if they have received an honorable discharge and are qualified to perform the duties of the position."

The questions submitted are the following:

1. Does the provision apply to former employees in the entire executive civil service or is it limited to former employees of the War Department?

2. Does the provision apply to former employees who entered the naval service or the Marine Corps as well as to those who were drafted or enlisted in the Army?

3. Does the provision apply to former employees who entered the military service as commissioned officers?

4. Does the provision apply to any person formerly employed in the civil service regardless of the period of time which may have elapsed between his leaving the civil service and his entering the military service?

I agree, in the main, with what is said in the memorandum by the commissioners, and not deeming a discussion of the questions necessary will answer them categorically.

(1) The provision is not limited to former employees of the War Department, but applies alike to former employees in any department of the Government.

(2) I am of opinion that the term "military service" was used in its broad sense and applies to the entire Military Establishment, which includes the Navy and Marine Corps as well as the Army. The provision therefore applies to former employees who entered the naval service or the Marine Corps as well as to those who entered the Army.

(3) The provision applies only to those who were drafted or who enlisted in the military service. This would include all who were either drafted or who enlisted as privates, although they may have subsequently been commissioned as officers. It also includes those who en-

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listed for the purpose of entering the officers' training camps, and who were afterwards commissioned. It does not include those who were commissioned from civil life and without having previously enlisted for any purpose.

(4) The provision does not apply to every person who may have been at any time in the past a Government employee. It applies only to those who were drafted while in the employ of the Government or who left Government employment for the purpose of enlisting.

Respectfully,

A. MITCHELL PALMER.

To the PRESIDENT.

REINSTATEMENT OF FORMER GOVERNMENT EMPLOYEES
WHO ENTERED THE MILITARY SERVICE

The provision of the Act of February 25, 1919 (40 Stat. 1164), which authorizes the reinstatement of former Government employees who have been drafted or enlisted in the military service of the United States in the war with Germany, does not apply to persons who were commissioned from civil life, without having previously enlisted for any purpose.

The provision, *supra*, requires the restoration of every former Government employee to the civil-service status he occupied before he entered the military service, but if the position the employee left was only a temporary one and has actually ceased to exist, his right to reinstatement is lost.

The provision requires that a former Government employee be reinstated in his former position if it exists, and this requirement is not satisfied by reinstating in a nonstatutory position one who vacated a statutory position, although the rate of pay and civil-service designation are the same in both.

The provision does not require that a former Government employee be reinstated if services of the character he is able to perform are no longer needed, but if such services are required, he must be reinstated, although they are already being satisfactorily performed by another employee.

DEPARTMENT OF JUSTICE,

May 12, 1919.

SIR: I have the honor to acknowledge receipt of your letter of April 11, 1919, in which you request my opinion upon several questions involving a construction of the

following provision of the Act approved February 25, 1919 (40 Stat. 1164):

"That all former Government employees who have been drafted or enlisted in the military service of the United States in the war with Germany shall be reinstated on application to their former positions, if they have received an honorable discharge and are qualified to perform the duties of the position."

These questions and the answers thereto are as follows:

(1) Does the Act apply to ex-employees who were dropped or left the service for the purpose of accepting a commission in the United States Army?

The provision applies only to those "who have been drafted or enlisted in the military service." This would include all who were either drafted or enlisted as privates, although they may have subsequently been commissioned as officers. It also would include those who enlisted for the purpose of entering the officers' training camps, and who afterwards received commissions as officers. While it is difficult to see any reason for making a distinction between such persons and those who received commissions from civil life, still the words "drafted or enlisted" have such a well-settled and definite meaning that I am constrained to believe they can not be held to include those who were commissioned from civil life, without having previously enlisted for any purpose.

(2) Does the Act apply to ex-employees who were holding temporary positions at the time they entered the military service, which positions were of a temporary character and as the emergency caused by the war diminished or ceased would, in due course, be abolished?

The Act requires the restoration of every former Government employee to the civil-service status he occupied before he entered the military service. If the position he left was only a temporary one, his right to reinstatement is qualified by the right to abolish the position when the need for it is at an end. It follows that if a position has actually ceased to exist, the statute does not apply. Until that event it does apply.

(3) Does the Act require that an ex-employee who was separated from a statutory position, for the purpose of entering the military service, that is, a position specifically created by Congress, be reinstated in the statutory place he vacated or will the provisions of the Act be met by reinstating him in a position of similar designation and pay, with his compensation paid from a lump-sum appropriation?

The Act entitles a former Government employee to reinstatement in his former position if it exists. This requirement is not satisfied by reinstating in a nonstatutory position one who vacated a statutory position although the rate of pay and civil-service designation are the same in both.

(4) At various arsenals and manufacturing stations under the War Department the force of employees is being reduced from time to time due to diminishing work and at these places employees have been and are still being paid from lump-sum appropriations. At such places and in such services, does the Act require that an ex-employee be reinstated regardless of the fact that services of the character he is able to perform are no longer required or that the existing force engaged on the duties for which he is qualified at the time he applies for his reinstatement is sufficient for the work on hand; or does the Act require that the ex-employee be reinstated if there is work at his former station which he is qualified to perform although such work is already being satisfactorily performed by another employee who would have to be dropped to make way for the ex-soldier?

This question is answered by the answer to question 2. The Act does not require that a former Government employee be reinstated if services of the character he is able to perform are no longer needed, but if such services are required, he must be reinstated, although they are already being satisfactorily performed by another employee.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF WAR.

**SELLING WAR MATERIAL AND LEASING TRACTORS FOR
COMMERCIAL PURPOSES.**

As part of the consideration for the purchase of certain war material acquired by the Government since April 6, 1917, the Secretary of War is authorized, when in his discretion it will be for the public good, to lease for commercial purposes, for a period not exceeding five years and revocable at any time, caterpillar tractors, dies, and gauges belonging to the United States, under the provisions of the Act of July 28, 1892 (27 Stat. 321).

DEPARTMENT OF JUSTICE,*May 21, 1919.*

SIR: In your letter of the 7th instant you request an opinion from me as to whether a purchaser of war material may be legally permitted to use certain property belonging to the United States for commercial purposes as part of the consideration for the purchase of said material.

The material facts as I gather from your letter are that the War Department has on hand a supply of caterpillar tractors sufficient for present needs but that in the event of a resumption of hostilities, or a future war, there would be urgent necessity for an immediate and large increase of this supply. To insure this increase and an adequate force of skilled superintendents and laborers, a commercial use of this type of tractor should be developed by some manufacturing company which could readily divert its output to this purpose in time of war.

The Department is the owner of the only dies and gauges available for the manufacture of these tractors, and has on its hands material and work in process of manufacture which it had intended, prior to the armistice, to convert into completed tractors. The Holt Manufacturing Co., which is the owner of the patent for making these tractors, is willing to purchase this material at an advantageous price if the Department will permit it to use certain of its tractors for exhibition and demonstration, and its dies and gauges for the manufacture of the materials into commercial products. These are the only completed tractors, dies, and gauges available for the purpose specified. The company will agree to return the tractors, dies, and gauges in their present condition or to replace them

with such improvements as their use for commercial purposes would indicate to be possible.

The Department has no immediate use for the tractors, dies, and gauges, but wishes to retain title to them for military purposes. A contract allowing the use of this equipment would result in the maintenance of a state of preparedness for military protection of the Nation and a development of the value of a military weapon which could otherwise be made by the Department only at a very considerable expense to the country.

The Constitution declares (Art. IV, sec. 3) that—

“The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.”

In pursuance of authority granted by the Constitution, the act of July 9, 1918 (40 Stat. 845, 850), making appropriations for the support of the Army, provides, among other things, for the sale of war supplies as follows:

“That the President be, and he hereby is, authorized, through the head of any executive department, to sell upon such terms as the head of such department shall deem expedient, * * * any war supplies, material and equipment * * * acquired since April six, nineteen hundred and seventeen.”

With a proviso—

“That a detailed report shall be made to Congress on the first day of each regular session of the sales of any war supplies, material * * * and equipment made under the authority contained in this or any other Act, * * * showing the character of the articles sold, to whom sold, the price received therefor, and the purpose for which sold * * *.”

By the act of July 28, 1892 (27 Stat. 321), it is provided:

“That authority be, and is hereby, given to the Secretary of War, when in his discretion it will be for the public good, to lease, for a period not exceeding five years and revocable at any time, such property of the United States under his control as may not for the time be required for public use and for the leasing of which there is no authority under existing law, and such leases shall be reported

annually to Congress: *Provided*, That nothing in this act contained shall be held to apply to mineral or phosphate lands."

I am of the opinion that the war material in question, acquired by the Government since April 6, 1917, may be legally sold under the provisions of the act of July 9, 1918, *supra*, but there is nothing in that act which confers authority upon the Secretary of War to dispose of such property in any other way. That the tractors, dies, and gauges belonging to the United States may be legally leased to the Holt Manufacturing Co. for commercial use, under the provisions of the act of July 28, 1892, *supra*, for a period not exceeding five years, revocable at any time, in consideration of the purchase of the war material in question by said company for an advantageous price, or for any other consideration that may in the discretion of the Secretary of War appear to be for the public good.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF WAR.

COMPROMISE OF PENALTIES ARISING UNDER INCOME-TAX LAWS.

The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, is authorized to compromise claims for penalties imposed and interest charged against taxpayers for delinquencies under the income tax laws in all cases where, in his judgment, such compromises are for the interest of the United States.

DEPARTMENT OF JUSTICE,

June 3, 1919.

SIR: I have had under careful consideration for some time a request from your predecessor for an opinion as to the power of the Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, to compromise claims for certain penalties arising under the income-tax laws. The specific claims mentioned are:

(1) Claims for amounts 50 per cent in addition to amounts of income and excess-profit taxes assessed under

authority of section 3176 of Revised Statutes, as amended by section 16 of the act of September 8, 1916 (39 Stat. 775), and of section 212 of the act of October 3, 1917 (40 Stat. 307), in cases of failure to make and file returns or lists within the time prescribed by law or by the collector;

(2) Claims for amounts 100 per cent in addition to amounts of income and excess-profit taxes assessed under authority of said sections in cases of false or fraudulent returns or lists willfully made; and

(3) Claims for sums of 5 per cent on amounts of income and excess-profit taxes not paid when due and interest at the rate of 1 per cent per month on said taxes, the collection of which is authorized by sections 9 (a) and 14 (a) of the act of September 8, 1916 (39 Stat. 763, 772), and section 212 of the act of October 3, 1917 (40 Stat. 307).

The exact question submitted is whether, under the authority of section 3229 of Revised Statutes, the Commissioner of Internal Revenue is authorized to compromise these penalties in cases in which there is no doubt as to the legal liability of the taxpayer or as to the collectibility of the claim, but in which, in the opinion of the Secretary of the Treasury and that of the commissioner, considerations of justice, equity, and public policy warrant a reduction of the amounts to be collected on the ground that the statutory amounts are in the nature of penalties for delinquencies, and that, though such amounts are technically due and are collectible, the collection of them inflicts punishment which is unduly severe in view of the culpability.

Section 3229 of the Revised Statutes is as follows:

"The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal-revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the commissioner the opinion of the Solicitor of Internal Revenue, or of the officer acting as such, with his reasons therefor, with a

statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise."

It will be observed that the power to compromise is given in very broad and general terms. Congress has not seen fit to specify the considerations which shall control the commissioner in determining whether a case ought or ought not to be compromised instead of commencing suit, nor to place any limitation upon this exercise of power, except that his action shall be with the advice and consent of the Secretary of the Treasury. After suit is commenced the power is to be exercised only with the advice and consent of the Secretary of the Treasury and the recommendation of the Attorney General.

The act of Congress which, somewhat condensed and shortened, was carried into the Revised Statutes as section 3229 was section 102 of the act of July 20, 1868 (15 Stat. 125, 166). That act conferred the power to compromise in all cases arising under the internal-revenue laws where, instead of commencing or proceeding with a suit, "it may appear to the Commissioner of Internal Revenue to be for the interest of the United States to compromise the same." The language just quoted was omitted from section 3229. It will be seen, therefore, that the original act authorized a compromise whenever, in the opinion of the Commissioner of Internal Revenue it was "for the interest of the United States." These words were by way of limitation upon his power. Their omission from section 3229, therefore, can not be said to render the power more restricted than it was under the original act. Certainly, then, section 3229 can not be given a narrower meaning than to say that the power is conferred to make any compromise which in the opinion of the commissioner, acting with the advice and consent of the Secretary of the Treasury, and, in the event suit has been commenced, upon the recommendation of the Attorney General, will be for the interest of the United States. The fact that the act applies to both civil and criminal cases, and the further fact that when a com-

promise is made there shall be placed on file the opinion of the Solicitor of Internal Revenue stating the reasons for the compromise, the amount of tax assessed, the amount of additional tax or penalty imposed, and the amount actually paid, make it plain that whatever power to compromise is given extends to penalties, such as those mentioned in the request for this opinion.

Opinions of my predecessors touching the nature and extent of the power of the commissioner to make compromises are more or less conflicting and it will not, I think, serve any useful purpose to review and attempt to reconcile them. I have given them, as well as all decisions of the courts bearing in any way on the question, careful consideration and will content myself with stating my conclusions.

Your request does not relate to compromises of taxes, but only to penalties and interest imposed on account of delinquencies of the taxpayer. I shall accordingly confine my opinion to penalties and interest.

It seems clear that Congress has left it to the judgment and discretion of the commissioner to determine when it is to the interest of the United States to compromise such claims instead of commencing or prosecuting suits therefor, and that the only limitation placed upon the exercise of this judgment and discretion is that his action shall be with the advice and consent of the cabinet officers mentioned in the statute. And I am of opinion that, subject to this limitation, he has the power to compromise the penalties and interest mentioned in the request for this opinion whenever, in his judgment, such compromises are for the interest of the United States. Congress has not said that such compromises may be made only when in the judgment of the commissioner more money can thereby be realized than can be realized by commencing and prosecuting a suit. It can not be said, therefore, as a matter of law, that the power to compromise is limited to cases in which either the liability for the penalty or the collectibility of the claim is doubtful. In these matters I think the judgment of the commissioner as to what is for the interest of the United States is made conclusive. What considerations shall control are fixed by no rule of law, but depend upon

his own discretion and sound judgment exercised in good faith. It may be that with respect to the amount of tax to be collected, or the amount of penalty resulting from wilfull fraud, the commissioner may never find a case in which he will feel justified in accepting less than can be legally collected, whereas in cases of penalties resulting from accident, negligence, or technical omission, he may honestly believe that the interests of the United States will be best served by accepting less than the full penalty. In such cases, I am of opinion that he has the right to compromise upon any ground which, in his judgment, renders the compromise for the interest of the United States.

Respectfully,

A. MITCHELL PALMER.

TO THE SECRETARY OF THE TREASURY.

SALE OF ENEMY-OWNED PATENT TO UNITED STATES.

Under a provision of the Act of March 28, 1918 (40 Stat. 460), which amends section 12 of the Trading with the Enemy Act, the Alien Property Custodian can, for a fair and substantial consideration, sell any property, of which he becomes possessed, to the United States, but he can not sell such property for a merely nominal consideration.

The sale of an enemy-owned patent by the Alien Property Custodian to the War Department acting for the United States could hardly affect an existing claim on account of the owner of the patent against the United States for past infringements, and the matter would not seem to be one considered in computing the fair value of the patent which it is proposed shall be sold.

If the United States becomes the owner of a patent it can exercise the usual proprietary rights of such an owner and can, therefore, enforce its rights against unlicensed users; can grant licenses; and can make assignments which carry with them full domination of the patent so far as rights thereunder are conveyed.

The Attorney General does not at the present time feel at liberty to express an opinion upon certain questions propounded by the Secretary of War, because they seem unrelated to the question which has actually arisen in the administration of his Department and can hardly have any material bearing on that question.

DEPARTMENT OF JUSTICE,

June 14, 1919.

SIR: I have the honor to acknowledge receipt of your letter of May 10, 1919, informing me that the War De-

partment is considering the purchase of United States patent No. 923052, which is owned by the Krupp Co. of Essen, Germany, and which dominates a patent covering the split trail construction of the United States Model 1916, 75-m/m. field gun. You state that the Alien Property Custodian has been requested to seize this Krupp patent and it is inferred that he has done so. You ask my opinion whether the Trading with the Enemy Act and its amendments authorize the Alien Property Custodian to sell this patent to the War Department acting for the United States either for a nominal consideration or for a fair and substantial consideration. You further ask me whether such a sale would deprive the Krupp Co. of such compensation as it would otherwise be entitled to for the use which the United States may already have made of its patent.

Under the Trading with the Enemy Act as originally enacted the Alien Property Custodian was vested with the powers of a common law trustee over property which came into his possession and had power to sell such property—"if and when necessary to prevent waste and protect such property and to the end that interests of the United States in such property and rights or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded." (40 Stat. 423, sec. 12.)

This language clearly did not authorize a sale for a nominal consideration.

Section 12 was amended by the act of March 28, 1918 (40 Stat. 460). As so amended the Custodian remained vested by it with all of the powers of a common law trustee "and in addition thereto" was authorized in broad terms to manage and sell property which came into his possession as though he were the absolute owner. This power, however, was to be exercised under the supervision and direction of the President and under such rules and regulations as the President should prescribe and it was provided that sales under the Act, except sales to the United States, should be made at public auction and after advertisement, unless the President should expressly other-

wise determine.¹ The chairman of the Committee on Appropriations of the House of Representatives, in reporting the action of the conference committee which had recommended this amendment to section 12, stated this proviso was intended to safeguard the disposition of enemy property. (56 Cong. Rec. 4083.) As a part of the same act of March 28, 1918, the United States was authorized to acquire certain enemy property belonging beneficially to certain German steamship lines, and was expressly required to make just compensation therefor. Reading together the manifest intention of the original act with the amendment considered in the light of attending consequences, I am of opinion that it was the intention of the Congress that any disposition by sale of property which comes into the possession of the Alien Property Custodian should be only at a substantial and fair consideration, the proceeds, of course, under other provisions of the Act being paid into the Treasury of the United States, there to await the further action of the Congress.

In view of the express language of the act of March 28, 1918, I am of opinion that the Alien Property Custodian can sell any property, of which he becomes possessed, to the United States, but, as I have stated, I think he can not sell it for a merely nominal consideration, but must require the payment of an amount which fairly represents the value of the property to so transfer it.

I do not agree with the suggestion that such a sale by the Custodian to the United States would not convey to the latter a valid title which all persons, and for that matter all Governments, would be required to respect. So far as I can see the matter is one of purely our domestic law. In any event the only country whose interests would seem possibly to be affected in any manner, diplomatically or otherwise, is the Government of Germany. While at this date it is not possible to speak with assurance there is certainly reason to believe that the treaty of peace will ef-

¹ The President did by Executive orders, dated July 16, 1918, and December 3, 1918, make rules and regulations governing sales by the Custodian, but nothing contained in these alters the conclusions herein expressed.

fectually dispose of the possibility of the question arising from that quarter.

Turning to your second question with respect to the possibility of the owners of the Krupp patent having some claim for infringement against the United States, the assignment of the patent could hardly affect this question, infringement having been committed before the assignment. (See *Moore v. Marsh*, 7 Wall. 515, 522.) It is probable that this matter will also be disposed of by the treaty of peace, and that the result will be that no liability could exist on account of this infringement. If the matter shall not so be disposed of and if it be assumed that there is now an existing claim on account of the owner of the patent against the United States for the past infringements, it is suggested that it may be disposed of through the machinery of the office of the Alien Property Custodian, but independently of the sale of the patent. That is to say, if such a claim exists, it is enemy property. If it is enemy property, it is subject to seizure. If it is subject to seizure, it is subject to adjustment on a proper basis in the hands of the Custodian. In any event, the matter would not seem to be one to be considered in computing the fair value of the patent which it is proposed shall be sold.

Turning to certain further questions which you ask, I am of the opinion that if the United States becomes the owner of a patent it can exercise the usual proprietary rights of such an owner and can, therefore, enforce its rights against unlicensed users; can grant licenses, and can make assignments which carry with them full domination of the patent so far as rights thereunder are conveyed. In this connection, however, it is probable that no such assignment could be made except under specific enabling legislation. (Constitution, Art. IV, sec. 3, cl. 2; *United States v. Hare*, Fed. Cases No. 15303; *United States v. Nicoll*, Fed. Cases No. 15879).

You ask certain other questions which seem to me unrelated to the question which has actually arisen in the administration of your Department, upon which I do not at present feel at liberty to express an opinion. (10 Op. 50; 19 Op. 331.) These are whether if it acquired the patent

and grants licenses thereunder, the United States can agree that it will proceed against infringers in behalf of its licensees; whether this Department has authority to prosecute such infringement suits and has the personnel and facilities for so doing; and whether a patent purchased by the United States can be assigned to one of the Departments of the Government to the exclusion of other Departments. If and when these questions shall arise as an actual incident in the business of the War Department, I shall be glad to consider a request for an expression of my opinion. Since, however, they can hardly have any material bearing on the actual fair present value of the Krupp patent, in connection with which question you state they are asked, I deem it my duty not to express an opinion upon them at the present time.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF WAR.

CIVIL SERVICE—APPOINTMENT OF SUPERVISORS OF THE
CENSUS.

Under the Act to provide for the fourteenth and subsequent decennial censuses (40 Stat. 1291), the appointment of the supervisors is not subject to the Civil Service Act and rules.

DEPARTMENT OF JUSTICE,

June 14, 1919.

SIR: You have recently referred to me a letter from the Civil Service Commission dated May 17, 1919, requesting of me an expression of my opinion upon the question whether the Act of March 3, 1919, to provide for the Fourteenth and subsequent decennial censuses (40 Stat. 1291, c. 97) requires the appointment of supervisors of the census in accordance with the Civil Service Act and rules.

I am of the opinion that these appointments are not subject to the Civil Service Act or rules. Section 9 of the census act provides that the supervisors shall be appointed by the Secretary of Commerce upon the recommendation of the Director of the Census.

A provision that the supervisors shall be appointed by the Secretary of Commerce would not be inconsistent with the civil service act under established precedents (25 Op. 343; 26 Op. 502), and the appointments would have to be made by the Secretary of Commerce in conformity to that act. But the appointments here are to be made upon the recommendation of the Director of the Census. This language indicates affirmatively the intention of Congress that the civil service rules should not apply, for rule 7, section 1b, of these rules provides that the nominating or appointing officer must select his appointees only from a limited list of names certified as eligible, unless, for reasons not material here, such persons are disqualified. Where, as here, a considerable number of appointments are to be made, the application of the civil service rules would practically eliminate administrative discretion.

As is noticed later the method of appointing supervisors adopted by the Act of March 3, 1919, is a departure from the method employed in prior legislation providing for the decennial taking of the census. The change which limits the choice of supervisors to those recommended by the Director of the Census must have been intended to utilize the experience and special knowledge of this official and to permit administrative discretion in selecting the field of appointees. This theory is utterly inconsistent with their selection by the civil service rules. If appointments are to be determined by those rules, the provision for appointment of supervisors upon recommendation by the Director of the Census becomes superfluous. I am therefore led to the conclusion that Congress did not intend to have the Civil Service Act apply to these appointments. Language less clear has been held sufficient to indicate the intention of Congress that civil service rules should not apply. (22 Op. 556; 25 Op. 414.)

It is, also, very significant that the Act of March 3, 1919, makes specific provision in section 3 and section 7 for the application of civil service rules in the selection of certain designated employees, and that no such provision is found in section 9 where the appointment of supervisors is provided for.

But if the language of the act leaves any doubt as to the matter that doubt is removed by a consideration of the history of the provision in question and the reports of the congressional committees. Under the act of July 2, 1909 (36 Stat. 1), providing for the Thirteenth and subsequent decennial censuses, supervisors were to be appointed by the President by and with the advice and consent of the Senate. Neither under the provisions of that bill nor of previous laws had it been provided that their appointment should be made in accordance with the Civil Service Act.

It appears from the Senate report on the Act now in question (65th, 2d Rep. No. 621, p. 34) that after the census bill had passed the House with the provision as to the appointment of supervisors in its present form the President of the Civil Service Commission and a representative of the Civil Service Reform League were heard by the Senate Committee on the Census in protest against that provision of the bill. The former advocated that supervisors should be appointed through the machinery of the Civil Service Commission. The committee did not, however, act upon this recommendation, but adopted an amendment whereby supervisors should be appointed by the President by and with the advice and consent of the Senate, making the provision similar in that respect to the Act providing for the Thirteenth Census. However, the Senate subsequently receded from that amendment and the provision as to the appointment of supervisors was passed by it in the form in which it was passed by the House. It is stated in the Senate committee report on the bill, on page 36, and in the minority House report on the bill, page 5, that supervisors are not to be appointed in conformity with the Civil Service Act. That this is the correct construction of the provision appears clearly from what has been said above.

Respectfully,

A. MITCHELL PALMER.

To the PRESIDENT.

APPOINTMENT OF FIELD REPRESENTATIVE OF GEOLOGICAL SURVEY AT SALARY OF \$1 A YEAR.

The employment of Mr. Blucher, who is secretary of the Southwest Coal Bureau, at a salary of \$1 a year as a field representative of the Geological Survey for the purpose of collecting weekly reports of coal production, etc., would cause a violation of the proviso to the act of March 3, 1917 (39 Stat. 1106), prohibiting officials and employees from receiving other than Government salaries for services, for the reason that the salary received by him from the Southwest Coal Bureau would, to some extent at least, be received and paid in connection with services performed by him for the Government.

DEPARTMENT OF JUSTICE,

June 16, 1919.

SIR: I have the honor to acknowledge the receipt of your letter of April 5 requesting my opinion as to the legality, in view of the proviso in the legislative, executive, and judicial act of March 3, 1917 (39 Stat. 1070, 1106), of appointing, at a salary of \$1 a year, W. E. Blucher, of Kansas City, Mo., as a field representative of the Geological Survey for the purpose of collecting weekly reports of coal production and working time at the coal mines in Iowa, Missouri, Kansas, Oklahoma, Arkansas, and Texas, and certain other statistics, which appointment it is proposed shall continue after July 1, 1919.

In the papers transmitted by you for consideration in connection with your request it is stated that Mr. Blucher is the secretary of the Southwest Coal Bureau, having offices at Kansas City, Mo., an organization of coal operators in Kansas and Missouri collecting for its members information of conditions affecting the market. While not specifically stated in the papers, it is evident that Mr. Blucher receives a salary from this bureau for his services as its secretary in collecting this information.

The proviso referred to is attached to the appropriation for the Bureau of Education, and reads as follows:

"Provided, That on and after July first, nineteen hundred and nineteen, no Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be con-

tributed out of the treasury of any State, county, or municipality, and no person, association, or corporation *shall make any contribution to, or in any way supplement the salary of,* any Government official or employee *for the services performed by him for the Government of the United States.* Any person violating any of the terms of this proviso shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$1,000 or imprisonment for not less than six months, or by both such fine and imprisonment as the court may determine." (Italics mine.)

At my request you submitted in your letter of April 16 a further statement of the work done by Mr. Blucher for the Southwest Coal Bureau and of that proposed to be done by him for the Geological Survey, and with your letter of May 23 you transmitted a letter from Mr. Blucher to Mr. J. D. A. Morrow, general secretary of the National Coal Association, with certain exhibits attached setting out fully and in detail the aforesaid work.

After a careful consideration of these papers, I have reached the conclusion, based upon the letter of Mr. Blucher and its exhibits, referred to above, that the employment of Mr. Blucher by you will cause a violation of the proviso to the act of March 3, 1917, for the reason that the salary received by him from the Southwest Coal Bureau will, to some extent at least, be received and paid in connection with services performed by him for the Government.

Respectfully yours,

A. MITCHELL PALMER.

To the SECRETARY OF THE INTERIOR.

PROSECUTION OF CLAIMS AGAINST UNITED STATES BY
ARMY OFFICERS.

An officer in the United States Army is not by virtue of that fact alone an officer in the War Department within the meaning of section 190 of the Revised Statutes, which relates to the prosecution of claims against the United States.

Where, however, Congress creates an office or bureau in the Department and authorizes the appointment of an Army officer to the office, or in the bureau, such Army officer, after receiving his

new appointment, would fall within the reach of section 190 of the Revised Statutes, for he would then be an officer in the Department.

In the absence of a statement showing the result of a search for laws other than section 190 of the Revised Statutes bearing upon the question propounded by the Secretary of War, the Attorney General feels constrained, under the rules governing the rendition of opinions, to withhold a categorical answer upon the point.

DEPARTMENT OF JUSTICE,

June 18, 1919.

SIR: I have the honor to acknowledge receipt of your letter of the 3d instant, wherein you request my opinion upon the question whether "an officer of the United States Army is an 'officer' within the meaning of section 190 of Revised Statutes of the United States." You accompany your letter with an opinion of the Acting Judge Advocate General of the Army showing that his office has repeatedly held that section 190, *supra*, does not cover officers of the Army.

The statute to which you refer reads as follows:

"It shall not be lawful for any person appointed after the first day of June, one thousand eight hundred and seventy-two, as an officer, clerk, or employee in any of the Departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said Departments while he was such officer, clerk, or employee, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employee."

By the plain terms of this statute its prohibitions embrace only persons appointed "as an officer, clerk, or employee in any of the departments"; that is to say, any of the executive departments. Section 159, Revised Statutes. Thus the question propounded by you is narrowed to the query whether a person appointed an officer in the Army is thereby appointed an officer in the Department of War.

The precise question appears not to have been judicially determined, but I find that some of my predecessors, and other Federal law officers, in construing analogous statutes, have laid down principles, which, applied to the

statute you ask me to interpret, compel a negative response to your question.

Thus in 28 Op. 95, the question dealt with involved, *inter alia*, the power of the President under section 179, Revised Statutes, to authorize or direct an officer of the Navy to act as the head of the Navy Department. That section permitted such designation only in the event the Navy officer could be regarded as an officer in the Navy Department. In holding that he was not an officer in the department, Attorney General Wickersham said:

"But the person who may be authorized and directed to perform the duties of a vacant office under section 179 must be an officer in a department. It is not sufficient that he has been appointed an officer by the President, by and with the advice and consent of the Senate; he must hold an office in a department which is established by law."

* * * * *

"Officers in the Navy are appointed, by provision of law, to perform duties in the Department of the Navy. Thus, by section 421, 'The chiefs of the several bureaus in the Department of the Navy shall be appointed by the President, by and with the advice and consent of the Senate, from the classes of officers mentioned in the next five sections, respectively, or from officers having the relative rank of captain in the staff corps of the Navy, on the active list, and shall hold their offices for the term of four years.'"

The point is further elucidated in 15 Op. 262, 267, where it was said, in construing the statute authorizing the use of penalty envelopes by the Executive Departments, and any bureau or office thereof:

"The several Executive Departments are by law established at the seat of Government; they have no existence elsewhere. Only those bureaus and offices can be deemed bureaus or offices in any of these Departments which are constituted such by the law of its organization. The Department, with its bureaus or offices, is in contemplation of the law an establishment distinct from the branches of the public service and the offices thereof which are under its supervision. Thus, the office of postmaster, or of collector of internal revenue, or of pension agent, or of con-

sul, is not properly a *Departmental* office—not an office in the Department having supervision over the branch of the public service to which it belongs. True, an official relation exists here between the office and the Department, one, moreover, of subordination of the former to the latter; but this does not make the office a part of the Department.”

See also 19 Op. 503, and 29 *idem* 249, 251.

It follows from the opinions above reviewed, that an officer of the Army is not an officer in the Department of War, unless the relations between the Army and the department proper can be distinguished from the various official relations dealt with in those opinions, particularly the one holding that an officer of the Navy is not an officer in the Department of the Navy. There is no such distinction, and the legislative intent in this regard is nowhere more concretely manifested than in the Act of August 5, 1882 (22 Stat. 238), which empowers the President to authorize or direct the commanding general of the Army or the chief of any military bureau “to perform the duties of the Secretary of War under the provisions of section 179 of the Revised Statutes.” This is significant when it is borne in mind that section 179 Revised Statutes, as hereinbefore pointed out, already authorized the President to detail “any officer” in any of the Departments to such service.

I also find that the Comptroller of the Treasury has had occasion to consider the relations between the Army and the Department of War. In volume 19 of his decisions and at page 837 he said, in interpreting a statute dealing with the purchase of supplies for “the executive departments”:

“What is included within the words ‘executive departments’ is well understood. The War Department is an executive department, but the Army is not a part of that executive department. The Navy Department is an executive department, but the Navy is not a part of that executive department.”

In view of the foregoing I have no hesitation in advising you that an officer in the United States Army is not by virtue of that fact alone an officer in the Department

of War within the meaning of section 190 of the Revised Statutes. Where, however, Congress creates an office or bureau in the department and authorizes the appointment of an Army officer to the office, or in the bureau, such Army officer, after receiving his new appointment, would fall within the reach of section 190, Revised Statutes, for he would then be an officer in the department.

You also inquire whether there be any other law or laws bearing upon this subject. In the absence of a statement from your Solicitor showing the result of his search for such laws, I feel constrained, under the rules governing the rendition of opinions, to withhold a categorical answer upon the point.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF WAR.

INCOME TAX—SALARIES OF PRESIDENT AND FEDERAL JUDGES.

The salaries of the President of the United States and the judges of the Supreme and inferior courts of the United States are subject to the income tax imposed by the Act of February 24, 1919 (40 Stat. 1057).

The provision of said Act (40 Stat. 1065) requiring the salaries of the President and the Federal judges to be included as a part of their gross incomes for the purposes of the income tax is valid and constitutional, as it does not diminish the compensation of these officials within the meaning of the constitutional inhibition.

DEPARTMENT OF JUSTICE,

May 6, 1919.

SIR: I have the honor to acknowledge receipt of your letter of March 10 last, requesting an opinion on the following questions:

(1) Is the salary paid by the United States to the President subject to the income tax imposed by the Revenue Act of 1918? and (2) are salaries paid by the United States to Federal judges subject to the income tax imposed by the Revenue Act of 1918? (40 Stat. 1057.)

NOTE.—This opinion was temporarily withheld from publication and later released.

The request is accompanied by an opinion of the Solicitor of Internal Revenue, in which he refers, among other things, to an opinion by one of my predecessors in 1869, published in 13 Op. 161, and reaches the conclusion that, so long as that opinion is unmodified, (a) a tax should be levied on the salary of the President under the Act of September 8, 1916, and under no other law, and (b) a tax should be levied only on the salaries of those Federal judges who have taken office after the passage of the Revenue Act of 1918.

Ordinarily, I would be content to say that it is not within the province of the Attorney General to declare an Act of Congress unconstitutional—at least, where it does not involve any conflict between the prerogatives of the legislative department and those of the executive department—and that when an act like this, of general application, is passed it is the duty of the executive department to administer it until it is declared unconstitutional by the courts.

Since, however, the Solicitor of Internal Revenue has based his advice to you upon an opinion by a former Attorney General, it is perhaps necessary, or at least proper, that I express an opinion on the questions submitted.

Each of the acts passed since 1913 levying an income tax, except the Revenue Act of 1918, which was approved February 24, 1919, expressly exempted from the tax the salary of the President during the term for which he had been elected at the time of the passage of the act and also the salaries of all judges then in office. The Act of February 24, 1919, in levying a tax upon the net income of individuals, provides that the net income shall be the gross income less certain deductions and subject to certain exemptions, and defines "gross income" as including "gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States * * * the compensation received as such) * * *." (40 Stat. 1065.) The question therefore is whether Congress, in levying an income tax, may constitutionally require the salaries of these officials to be included in their gross income from which the

deductions and exemptions allowed to all other individuals shall be deducted in order to ascertain the amount upon which they shall pay an income tax. The sections of the Constitution involved in an answer to your questions are:

(1) Article I, Section 8. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, * * *."

(2) The Sixteenth Amendment, which is as follows:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Under these provisions, it can not be doubted that Congress may levy an income tax on all incomes received from any source unless the broad power thus conferred is limited by some other provisions of the Constitution. The only other provision which can, by any possibility, affect the right to include the salaries of the officials mentioned in their gross incomes for the purposes of taxation are the following:

Article II, Section 1. "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Article III, Section 1. " * * *. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The question is whether these sections so limit those conferring the taxing power that Congress is not only denied the right to directly diminish the compensation of these officials during their respective terms, but is also without power to so frame a general income tax law that the undiminished compensation so received shall be taken into consideration in determining the amount of tax they shall pay.

In the opinion referred to above, while Attorney General Hoar, in 1869, did express the view that no income tax could lawfully be imposed upon the salary of the President or any judge in office at the time the statute was passed, it can not be said that he advised that a statute plainly attempting to impose such a tax should be ignored by the executive department because unconstitutional. The laws then in force merely taxed generally "the salaries of all civil officers of the United States." What was said of the power of Congress was said in the course of a review of the statutes for the purpose of ascertaining the legislative *intent*. And the conclusion reached was that Congress did not *intend* to embrace the salaries of the officials in question in the general phrase "all salaries of civil officers." The advice given, therefore, was based rather upon a *construction* of the statutes than upon their *unconstitutionality*.

In 1863 Chief Justice Taney addressed a letter to Hon. Salmon P. Chase, then Secretary of the Treasury, afterwards Chief Justice, asserting the unconstitutionality of an act requiring an income tax to be deducted from the salaries of judges. No notice appears to have been taken of this letter, and later it was ordered to be entered on the records of the court, and still later it was published as an appendix to 157 U. S. at page 701.

In the case of *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, Mr. Justice Field expressed the same views, in a separate opinion, stating the constitutional objections to the Income Tax Act then under consideration. Nothing, however, was cited by way of authority, except the opinion of Attorney General Hoar and the letter of Chief Justice Taney, above mentioned.

Although the views of Chief Justice Taney and Mr. Justice Field on a question of this kind are always entitled to great weight, these views, as above indicated, were expressed extrajudicially and can not be regarded as a judicial determination of the question.

In the case of *Dobbins v. Commissioners of Erie County*, 16 Pet. 434, the power of a State to tax the salaries of officers of the United States was denied. But this decision

rested upon the want of power in the one sovereignty to tax the agencies of government of the other, a principle entirely foreign to the present discussion.

There is no reported case in which the Federal courts have dealt directly with the question now involved, and it must therefore be treated as one which has not been authoritatively determined.

The constitutions of nearly, if not all, the States contain provisions more or less similar to those quoted above from the Federal Constitution. But the decisions of the courts of the various States throw very little light upon the question. Only in the States of North Carolina, Louisiana, Pennsylvania, and Wisconsin do the provisions in question appear to have been construed, and there is some conflict in what has been said by the courts of these States. In North Carolina two Attorneys General, rendering opinions at the request of the Chief Justice of the State, have held that the provision protecting the salaries of judges against diminution prevented the levying of a tax upon such salaries, and, as to one of these opinions, it is stated that it was approved in conference by the court. And in 1871 the Supreme Court of that State, in the case of *King v. Hunter*, 65 N. C. 603, in the course of a discussion as to the power of the legislature to take away from the sheriff a part of his powers and emoluments and confer them upon a tax collector, referred to the constitutional provision against diminishing the salaries of judges and said: "This is understood to exempt their salaries from taxation, because to tax is to diminish or, it may be, to destroy." (Page 613.)

In the case of *City of New Orleans v. Lea*, 14 La. Ann. 197, there is no statement of the nature of the tax in question, but merely a statement that the question in the case is "whether the city of New Orleans has the right, under the Constitution, to tax the salary of a justice of the Supreme Court of the State." The court then, following the authorities holding that the power to tax involves the power to destroy, reached the conclusion that the legislature had no power to tax such salaries in view of the constitutional inhibition against diminishing the salaries of judges during their continuance in office, and, not having

such power itself, could not confer it upon the city of New Orleans.

How far the opinions in the various States referred to above were controlled by the nature of the tax under consideration—that is, whether there is any distinction between a general revenue law applying to all individuals alike and a law which singles out and discriminates against persons whose salaries are protected by the Constitution—it is impossible to tell. Light seems to be thrown on this phase of the question, however, by the Pennsylvania cases.

In *Commissioners v. Chapman*, 2 Rawle (Pa.) 73, the statute involved dealt with county rates and levies, and, in enumerating the subjects of taxation, included "all officers and posts of profit." A judge of one of the inferior courts resisted the payment of a tax levied by the county commissioners and invoked a provision of the Constitution that the compensation of judges "shall not be diminished during their continuance in office." The court held against this contention, saying:

"Taxes are assessed for county purposes under the authority of the legislature, which is undoubtedly incompetent to reduce the defendant's salary. But as the constitution, like every other instrument, is to have a reasonable interpretation, the prohibition in question is to be restrained to laws which have such a reduction for their object and not for their consequence. On any other principle of construction a tax could not be constitutionally assessed on property purchased with money drawn from a judge's salary, which would, in reason, have as fair a claim to exemption as the salary itself. If we once get away from the plain inartificial import of the prohibition, it is not easy to foretell at what stage of refinement we shall stop. The object of the legislature was to apportion the public burden according to the ratio of property, and to produce in detail a result approaching as near as possible to that of an income tax—a measure of assessment more equable in the abstract than any other that could be proposed. Now, there is no reason to exempt a judge from contribution, which is not just as applicable to any other officer who presents no tangible surface but his office to the revenue laws; nor was the

object of the prohibition to place him in this respect on higher ground. The legislature could not constitutionally retrench a part of a judge's salary under the pretext of assessing a tax on it; but, for the *bona fide* purpose of contribution, a reasonable portion of it, like any other part of his property, may be applied to the public exigencies." (Page 77.)

That case was decided in 1829. The same constitutional question came before the court again in 1843, in *Commonwealth v. Mann*, 5 Watts & Sergeant's (Pa.) Reports, 403. The exact nature of the tax then involved is not explained, but it appears that the effect was to annually assess a tax upon salaries and emoluments of offices created or held by or under the constitution or laws of the State, and this tax was required to be retained out of the salaries. The court held the Act to be unconstitutional, saying:

"Twist it and turn it as you may, it is in vain to disguise the fact that in this attempt there is a plain and palpable infringement of our constitutional charter." (Page 417.)

The earlier case of *Commissioner v. Chapman* was not referred to, but the principle that the salaries of such officers may lawfully be included in the income upon which they are to pay a general income tax seems to have been clearly recognized, for the court said:

"It may be asked, has not the Legislature full power to tax her citizens? To this we answer, that is not denied. Taxation is an incident of sovereign power which acknowledges no limits except that discretion of those who use it, unless it be those objects of taxation which for wise reasons have been withdrawn from these general powers. The property of a judge, his income, whether derived from this or any other source, we admit is a proper subject of taxation. His security will, then, consist in being placed on the same footing with other citizens, and an abuse of them by any will be speedily corrected. Of this the relator does not complain; but he does complain that he, with others, is selected as a special object of taxation, contrary to the charter which he has solemnly sworn to support."

The question was in 1915 considered in Wisconsin in the case of *State ex rel. Wickham v. Nygaard*, 150 Northwest-

ern Reporter, 513, in which the authorities were carefully reviewed. The constitution of Wisconsin provided that: "Nor shall the compensation of any public officer be increased or diminished during his term of office." It also contained a provision that: "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the Legislature shall prescribe." To this was added, by the adoption of an amendment in 1908, the following:

"Taxes may also be imposed on incomes, privileges, and occupations, which tax may be graduated and progressive, and reasonable exemptions may be provided."

The income-tax law subsequently passed was levied, among other things, on "all wages, salaries, or fees derived from service." The legislature, however, seems to have had some doubt as to its right to tax the salaries of public officers, and hence attached a proviso to the effect that the Act should not apply to such salaries if to tax them would be repugnant to the Constitution. One of the judges of the State contested the liability of his salary for this tax. The argument in support of his contention was admirably stated by the court, as follows:

"Briefly stated, the position of the relator, in reference to the above-quoted constitutional provision, is this: If the State gives a salary with one hand and takes part of it away with the other, it diminishes the salary to the extent of the part taken, no matter under what pretense it is taken. The State may, if it sees fit, collect its entire revenue from a tax on incomes, and thus take away a large portion of the salary which it pays its officers. The power to tax involves the power to destroy (*McCulloch v. Maryland*, 4 Wheat. 316, 441, 4 L. Ed. 579), and, if a State may evade the constitutional provision referred to by using the taxing power, the safeguard provided has little force or vitality."

Speaking of the constitutional inhibition against diminishing salaries and the provision conferring the right to impose taxes on incomes, the court said:

"Both constitutional provisions are somewhat general in their nature. As applied to the right to tax incomes of State officers, section 26 of article 4 is no more specific

than is the amendment of 1908. Hardly as much so. The latter says that taxes may be 'imposed on incomes.' We are not at liberty to rewrite this clause so as to read that taxes may be 'imposed on incomes, except where the income consists of a salary received by a public officer.' We perceive very little room for construction, and, if a doubtful question were involved, it should not be resolved against the exercise of the taxing power by the State."

It was accordingly held that the relator was liable for the tax. It is true the provision against diminishing salaries was in the original Constitution and the authority to impose income taxes was in an amendment adopted later, and the court said that if there was any conflict between the two provisions the later would be regarded as amending the earlier.

In the present inquiry, since the Sixteenth Amendment merely removed a restriction as to the manner of levying taxes on certain kinds of incomes, the inhibition against diminishing salaries and the authority to levy taxes on incomes must be regarded as contained in the same instrument. The question is whether there is such conflict between them as that the one must be regarded as a limitation upon the other.

It is with great diffidence that I assume to dissent from the views of such eminent jurists as Chief Justice Taney and Mr. Justice Field, although extrajudicially expressed. But I am constrained to the view that the conclusions reached by the Pennsylvania and Wisconsin courts are sound and that the reasoning upon which they rest is conclusive of the question now under consideration.

I can not escape the conclusion that the framers of the Constitution, in adopting these provisions, did not intend that the one should impose a limitation upon the full and free exercise, through Acts of general legislation, of the power conferred by the other. Each was obviously adopted without reference to the other. The one conferred what the Supreme Court has described as "the all-embracing taxing authority possessed by Congress, including necessarily therein the power to impose income taxes, if only they conform to constitutional regulations which

were applicable to them." Since the adoption of the Sixteenth Amendment, it would seem that the only such regulation applicable to them is the requirement that they shall be uniform throughout the United States. The other provision was undoubtedly intended to secure and preserve the independence of the judiciary and the President. It precludes Congress from directly enacting that the salaries of these officials be reduced during their continuance in office. I assume also that it would prevent the levying upon their salaries of a special tax not applicable to others enjoying like incomes. But I can not find in the Constitution anything from which there can fairly be inferred an intent to confer upon these officials, in addition to stability of income, exemption from any of the ordinary burdens or obligations of citizenship. They are undoubtedly entitled to receive from the Government, for their services, an undiminished compensation. When received, it constitutes their incomes in whole or in part. By making this income subject to a tax levied upon the incomes of all citizens from whatever source derived, Congress has not, in any sense, diminished salaries. It has, at most, increased the cost of living by creating a new obligation of citizenship, to the discharge of which a part of the salaries must be devoted. My opinion is that the constitutional provisions in question protect the salaries which these officials shall receive, but do not, in any way, limit the power of Congress to create tax burdens to be borne by all citizens alike.

I am confirmed in the view that this expresses the proper relation between the two provisions of the Constitution in question by the principles which have been laid down by the Supreme Court in dealing with other constitutional provisions which have seemed to be more or less conflicting. Thus, under the interstate commerce clause of the Constitution, the power to regulate interstate commerce lies exclusively with Congress and beyond the control of the States. It has always been held that the State may not directly burden interstate commerce, either by taxation or otherwise. And every effort of the States to lay a tax on the transportation of the subjects of interstate commerce or on the receipts derived from them, or on the oc-

cupation or business of carrying on interstate commerce, has been condemned. It has, at the same time, however, just as uniformly been held that a tax that only indirectly affects the profits or returns from such commerce is not within the rule. For this reason it has been held that an individual or corporation engaged in interstate commerce is not exempt from ordinary property taxes upon property within the State, although employed in interstate commerce, and that a franchise of a corporation so engaged is a part of its property and subject to taxation. *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 695, 696; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 163.

In the case of *United States Glue Co. v. Oak Creek*, 247 U. S. 321, the question was whether a State in laying a general income tax upon the gains and profits of a corporation may include in the computation the net income derived from transactions in interstate commerce. The court, after referring to the cases just cited, said:

"Yet it is obvious that taxes imposed upon property or franchises employed in interstate commerce must be paid from the net returns of such commerce, and diminish them in the same sense that they are diminished by a tax imposed upon the net returns themselves."

And after discussing the difference between direct and indirect burdens, and between a tax upon gross receipts and one upon net income, the court speaking of a tax upon net profits, said:

"Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States."

It was accordingly held that the State of Wisconsin could include in the taxable income net profits derived from interstate commerce.

The case of *Peck & Co. v. Lowe*, 247 U. S. 165, involved the question whether a net income derived from the business of exporting goods was taxable under the Income Act of 1913. The two provisions of the Constitution involved were that which "conferred the power to lay taxes, imposts, and excises," and that which provided "no tax or duty shall be laid on articles exported from any State." It had been previously held that the latter provision qualified and restricted the former to the extent of excepting from the range of the taxing power articles in course of transportation, the act or occupation of exporting, bills of lading for articles being exported, charter parties for the carriage of cargoes from State to foreign ports, and policies of marine insurance on articles being exported. *Turpin v. Burgess*, 117 U. S. 504, 507; *Brown v. Maryland*, 12 Wheat. 419, 445; *Fairbank v. United States*, 181 U. S. 283; *United States v. Hvoslef*, 237 U. S. 1; *Thames and Mersey Insurance Co. v. United States*, 237 U. S. 19. In short, the Supreme Court had interpreted the latter provision as meaning that exportation must be free from taxation, and therefore required "not simply an omission of a tax upon the articles exported, but also a freedom from any tax which *directly* burdens the exportation." *Fairbank v. United States*, *supra*, pp. 292, 293. Adhering to but distinguishing these cases, the court said:

"The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it can not be applied to any income which Congress has no power to tax (see *Stanton v. Baltic Mining Co.*, *supra*, p. 113) it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are 'net income arising or accruing from all

sources.' There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation." (247 U. S. 174.)

It can scarcely be said that a purpose to limit the power to tax net incomes can be inferred from the inhibition against diminishing salaries any more than, or, indeed, as much as, from the positive prohibition against taxing exports.

In my opinion, the principles laid down in this line of cases are conclusive of the question now under consideration. The officials in question are entitled to receive an income from the Government which shall be not less than it was when their terms of office began. But when this income has been received, it is subject to the same burdens imposed by general laws which rest upon similar incomes received by others from other sources. The Revenue Act does not lay a tax on these incomes because of their source or in any discriminative way. The tax is laid on them just as it is laid on other income. The tax is not laid on the salaries as such. It does not necessarily apply to the whole of the salaries received. These salaries simply go, along with any other income the officials may have, to make up the gross income. From this, the same exemptions and deductions are allowed which are allowed to other taxpayers. And, as in the case of all other taxpayers, what is taxed is the amount of the gross income after making these allowances. Of course, this diminishes the amount which

the official has for other uses after discharging the obligations which, in common with other citizens, he owes the Government, just as the levying of taxes on property used in interstate or foreign commerce diminishes the net profits of the persons engaging in that business. This results, however, not because Congress has diminished the amount of his compensation, but because, by a general law, it has added another obligation. In other words, there has been no diminution in his compensation, but there has merely been an increase in the purposes to which that compensation, when received, must be devoted. I am impelled, therefore, to the opinion that this general tax law does not diminish the compensation of these officials within the meaning of the constitutional inhibition.

There is still another view of the matter which confirms me in the opinion expressed. In the case of the President the inhibition is against an increase as well as a diminution. If to impose an income tax is to diminish his salary, to repeal a tax in force at the beginning of his term would equally be to increase it. Hence, very logically, the reasoning of the Solicitor of Internal Revenue leads him to the conclusion that the President must pay the tax imposed by the Act of 1916 which was in force at the beginning of his present term, although that Act has since been repealed and no one else in the country now pays the tax. The extreme improbability that Congress intended such a result was one of the considerations which led Attorney General Hoar to construe the language used by it as not including the salaries of these officials. This avenue of escape from so anomalous a result is not open to me, for Congress has now expressed its purpose in unmistakable terms. I must consider this result, therefore, as bearing, not upon the intent of Congress, but upon that of those who framed the Constitution. So considered, it supports the conclusion that it was never intended that the amount which these officials should receive as compensation should be regarded as affected in any way by the amount of income taxes imposed upon them, in common with other citizens, either before or during their terms of office.

For the reasons stated, I am of opinion that the Act requiring the salaries of the officials in question to be included as a part of their gross incomes for the purposes of the income tax is valid and constitutional. Certainly it can not be said to be so clearly unconstitutional that an executive officer would be justified in ignoring or disregarding it.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.

CIVIL SERVICE—REOPENING EXAMINATIONS TO
VETERANS.

The proviso of section 6 of the Census Act of March 3, 1919 (40 Stat. 1293), gives to "honorably discharged soldiers, sailors, and marines, and widows of such," a preference in appointments from among those duly qualified, but this proviso does not relate to the examination of a candidate, which is a preliminary step to his qualification for a civil service appointment.

The Civil Service Commission may, in the exercise of its general power of control over examinations, find that the interests of good administration require special treatment in the reopening of examinations for those who were unable to compete in the original examinations because of their absence upon military or naval service, and, if the Commission should so find, such examinations may be reopened to veterans only.

DEPARTMENT OF JUSTICE,

June 24, 1919.

SIR: You have recently referred to me a letter from the Civil Service Commission dated June 11, 1919, stating that it would like to give immediate effect to the proviso of section 6 of the Census Act of March 3, 1919 (40 Stat. 1291, 1293, c. 97):

"That hereafter in making appointments to clerical and other positions in the executive departments and in independent governmental establishments preference shall be given to honorably discharged soldiers, sailors, and marines, and widows of such, if they are qualified to hold such positions"—

and asking my opinion whether it may do so by reopening

to veterans, and to them only, civil service examinations which closed before they had a chance to compete.

The proviso of section 6 of the act of March 3, 1919, to which you have referred me relates to preference in making appointments from among those duly qualified. Examination of a candidate is a preliminary step to his qualification for a civil service appointment. In my opinion the proviso of section 6 does not relate to preference to be given in the steps which must be taken to qualify for a civil service appointment.

Section 2, paragraph 2, clause 1 of the civil service act of January 16, 1883 requires "open, competitive examinations for testing the fitness of applicants for the public service." The word "open" implies an examination in which all may compete. I am also inclined to think that reopened examinations are subject to the same requirement, and that as a general rule they should be reopened to all upon the same terms.

The introductory sentence of section 2 provides, however, that rules contained in this section shall be in force "as nearly as the conditions of good administration will warrant." In paragraph 3 of section 2 the Commission is given power, subject to the rules made by the President, to make regulations for and have control of civil service examinations. In the exercise of the general power of control over examinations which is given to it the Civil Service Commission may find that the interests of good administration require special treatment in the reopening of examinations for those who were unable to compete in the original examinations because of their absence upon military or naval service.

If so, I am of the opinion that such examinations may be reopened to veterans only.

Respectfully,

A. MITCHELL PALMER.

TO THE PRESIDENT.

CIDER—TAXATION — IMPORTATION — MANUFACTURE AND SALE.

Under the Act of February 24, 1919 (40 Stat. 1110, 1116), cider is subject to the wine tax when sold as wine, and is subject to the soft drink tax when sold not as wine but in bottles or other closed containers, but it is not otherwise subject to the internal-revenue laws.

The provision of the Act of November 21, 1918 (40 Stat. 1047), which prohibits the importation of all alcoholic liquors includes cider if it contains enough alcohol to render it intoxicating.

Cider is not a vinous liquor within the meaning of the Act of November 21, 1918, and, regardless of its alcoholic content, the manufacture or sale thereof is not prohibited by that Act.

Since the Act of November 21, 1918, does not prohibit the manufacture or sale of cider, it will not be necessary for agents of the Treasury Department to report to the Department of Justice instances of its manufacture or sale.

DEPARTMENT OF JUSTICE,

June 30, 1919.

SIR: In your letter of March 20 you requested an opinion as to whether the so-called "War Prohibition Act" of November 21, 1918 (40 Stat. 1046), prohibits the manufacture or sale for beverage purposes of fermented apple juice, commonly known as "hard cider," which contains alcohol in sufficient quantity to produce intoxication.

In reply to my inquiry of April 29 as to what administrative action depended upon the opinion requested, I am advised by Assistant Secretary Moyle as follows:

"In response to your inquiry attention is called to the fact that under the revenue act of 1918, there is a tax imposed on 'soft drinks' put up in bottles or other closed containers for sale, as well as a tax on cider when put up and sold as wine. Under the act of November 21, 1918, the use of food or food materials is prohibited in the manufacture of beer, wine, and other intoxicating malt or vinous liquors after May 1, 1919, and the sale of intoxicating beverages after July 1, 1919, is prohibited thereby. Cider has never been treated as wine under the internal revenue laws except under the act of September 8, 1916, subsequently embodied in the acts of 1917 and 1918. There is authority for taxing cider when sold as wine, and in view of the nation-wide prohibition on July 1, next, it

becomes necessary to draw a line of demarcation between cider as a 'soft drink' and as a so-called 'hard drink,' depending on its alcoholic content. It would appear that special tax for its sale should be asserted after July 1 where the alcoholic content would justify its treatment as an intoxicating liquor."

From this I understand that what you desire to know is to what extent since the passage of the Act of November 21, 1918, cider is subject to the internal revenue laws.

I am not aware of any provision of the internal revenue laws which levies a tax broadly on either "intoxicating liquors" or "vinous liquors." The taxes are levied on specific kinds of liquors as "distilled spirits," "beer," "wine," etc.

Cider is just as distinctive a drink as wine, and just as well known by its own name. Taxes levied on "wines" have not been applied to it, and I have no hesitancy in reaching a conclusion that when Congress has used the word "wine" without qualification it has not intended to include cider. Indeed, section 610 of the revenue act of 1918 defines natural wine as "the product made from the normal alcoholic fermentation of the juice of sound, ripe grapes," etc. Section 611 then levies a tax upon "all still wines, including vermouth, and all artificial or imitation wines or compounds sold as still wine." (40 Stat. 1109, 1110.) It seems clear that Congress had in mind that the word "wine" denoted a product of the grape, but levied a tax also on imitations or beverages sold as wine. Hence, the internal revenue department has ruled that if cider is put up and sold as wine it must pay a tax. But it is not wine, and if not so put up and sold I am of opinion that it is not subject to this tax, regardless of the amount of alcohol it contains or of its intoxicating qualities. Nor is it subject to any other internal revenue tax except that imposed by section 628 on soft drinks, which applies only when it is sold in bottles or other closed containers.

I conclude that cider is subject to the wine tax when sold as wine, to the soft drink tax when sold not as wine but in bottles or other closed containers, and is not otherwise subject to the internal-revenue laws.

The act of November 21, 1918, has no relation to taxation. It merely prohibits (1) the manufacture and sale of "beer, wine, or other intoxicating malt or vinous liquors," and (2) the importation of "distilled, malt, vinous, or other intoxicating liquors."

The prohibition against importation applies broadly to all *intoxicating* liquors, and clearly includes cider if it contains enough alcohol to render it intoxicating.

The prohibition against manufacture and sale is couched in different language. Cider is not included unless it is a vinous liquor within the meaning of the act. As stated above, it is not necessary for the purpose of determining your duties with respect to the collection of taxes to determine whether it is such a liquor, since the act of November 21, 1918, does not impose on you the duty of enforcing its prohibition against the manufacture and sale of liquor. If cider is included in that prohibition, its manufacture does not subject the producer to any taxes other than those above mentioned, though it will subject him to prosecution by the Department of Justice.

Since, however, it would be proper for the agents of the department of internal revenue to call to the attention of the Department of Justice any violations of the act of November 21, 1918, which may come to their knowledge, I should advise you whether I regard cider as coming within the prohibition of the act.

As stated above, if the act applied alone to wine, I would have no doubt that cider was not included. But the act also includes other vinous liquors, and the question therefore is whether cider is a vinous liquor. The matter is not entirely free from doubt. Some of the courts have taken the view that whether cider is a vinous liquor is a question of fact and not of law. But it is a matter of common knowledge that the alcohol in hard cider is produced alone by fermentation, and I think the question narrows down until the only thing involved is whether in the ordinary acceptance of the words every liquor in which the alcohol is produced alone by fermentation is a vinous liquor. I have given the question very careful consideration, but since no administrative action by your department depends

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upon it, it does not seem necessary for me to review the authorities in this opinion. I am content, therefore, to state that my conclusion is that cider is not a vinous liquor within the meaning of the act of November 21, 1918, and that it will not be necessary for agents of your department to report to the Department of Justice instances of its manufacture or sale.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.

JOINT-STOCK LAND BANKS—LOANS TO CORPORATIONS.

Under the Federal Farm Loan Act of July 17, 1916 (39 Stat. 360), joint-stock land banks are not permitted to make loans either through national farm loan associations or through agents except to natural persons, and can not therefore lend to corporations.

DEPARTMENT OF JUSTICE,

June 30, 1919.

SIR: I have the honor to acknowledge receipt of your letter of June 11, 1919, asking me whether a joint-stock land bank may lend to a corporation.

The act of July 17, 1916 (39 Stat. 360), contains provisions for the formation of Federal land banks and joint-stock land banks, both designed to provide farmers with loans at a low rate of interest. In section 16, dealing with joint-stock land banks, it is provided in clause 3 that they "shall have the powers of, and be subject to all the conditions and restrictions imposed on, Federal land banks by this Act, so far as such restrictions and conditions are applicable." Since a restriction upon the powers of Federal land banks preventing loans to corporations would be applicable to joint-stock land banks, it is necessary to determine whether there is such a restriction affecting Federal land banks.

While Federal land banks are permitted by the statute to make loans secured by first mortgages on land, such loans are permitted only when made "through national farm loan associations as provided in section 7 and section 8 of this Act, or through agents as provided in section 15" (section 14).

National farm loan associations are to be made up exclusively of borrowers on farm-land mortgages (section 8) and any person desiring to borrow through such an association is required to become a member thereof. (*Ibid.*) National farm loan associations may be formed by "ten or more natural persons" who are or are about to become owners of farm land suitable as security for mortgage loans (section 7), and it is provided (section 9) that after a national farm loan association has been chartered "any natural person" who owns or is about to acquire suitable land may become a member thereof. These provisions, it will be observed, provide for membership by natural persons only, and there is no language in the statute to rebut the implication that membership is restricted to such natural persons.

It results from the facts that loans by Federal land banks through national farm loan associations can be made only to members of such associations and that corporations can not become such members, that Federal land banks can not loan to corporations through national farm loan associations.

Federal land banks are authorized to loan otherwise than through national farm loan associations only under the circumstances indicated by section 15, which provides that loans may be made through agents when it shall appear that national farm loan organizations are not likely, because of peculiar local conditions, to be formed in any given locality. But in the second paragraph of section 15 it is provided that loans made through agents "shall be subject to the same conditions and restrictions as if the same were made through national farm loan associations."

I see no reason for interpreting the words "conditions and restrictions" so as to exclude from their meaning the limitation running deeply into the structure and intention of the statute upon the character of the person to whom loans may be made. I come more quickly to this conclusion, because the provisions authorizing loans through agents were designed to meet special situations in which, because of peculiar local conditions, the normal method of making loans through national farm loan associations

was impractical, and not to supply an ordinary alternative to that method of extending credit.

I am therefore of the opinion that Federal land banks are not permitted to make loans either through national farm loan associations or through agents, except to natural persons and can not therefore lend to corporations. From what I have already said it follows that joint-stock land banks are subject to the same restrictions.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.

ADJUSTMENT OF LOSSES INCURRED IN PRODUCING MANGANESE, ETC., FOR THE GOVERNMENT.

The provision in section 5 of the Act of March 2, 1919 (40 Stat. 1274), which authorizes the adjustment of losses incurred in "producing or preparing to produce either manganese, chrome, pyrites, or tungsten in compliance with the request or demand" of certain designated governmental agencies, does not authorize the recognition of a claim based upon a general solicitation or appeal, but to come within the purview of this provision the claimant must have been asked specifically by one of these governmental agencies to produce or prepare to produce one or more of the named minerals.

The words "request or demand" as used in section 5 of the Act of March 2, 1919, *supra*, are synonymous with the word "ask."

DEPARTMENT OF JUSTICE,

July 1, 1919.

SIR: I acknowledge receipt of your letter of June 25, 1919, asking my advice as to the proper construction of the words "request or demand" as used in section 5 of the act of March 2, 1919 (40 Stat. 1274). The part of this section containing these words is as follows:

"That the Secretary of the Interior be, and he hereby is, authorized to adjust, liquidate, and pay such net losses as have been suffered by any person, firm, or corporation, by reason of producing or preparing to produce, either manganese, chrome, pyrites, or tungsten in compliance with the request or demand of the Department of the Interior, the War Industries Board, the War Trade Board, the Shipping Board, or the Emergency Fleet Corporation * * *."

The words "request" and "demand" are both synonyms of the word "ask." A demand might perhaps be said to

be a "peremptory request." The claims recognized by this section are those of persons who have suffered loss by "producing or preparing to produce either manganese, chrome, pyrites, or tungsten *in compliance with the request or demand* of the Department of the Interior, the War Industries Board, the War Trade Board, the Shipping Board, or the Emergency Fleet Corporation." That is, one of the five governmental agencies must have asked (either by request or demand) the claimant to produce or to prepare to produce one of the four named minerals. The statute specifies the five agencies authorized to make request or demand for the production of minerals, specifies the minerals, and specifies that the production, or preparation for production, must have been "*in compliance with the request or demand*" of one of the five agencies.

The language used could hardly be more clear or allow less room for construction. No claim based upon a general appeal or solicitation is authorized by it, but to come under the statute the claimant must have been asked specifically by either the Department of the Interior, the War Industries Board, the War Trade Board, the Shipping Board, or the Emergency Fleet Corporation to produce or prepare to produce one or more of the four named minerals.

In your inquiry you state:

"Many claims have been filed which appear to be based upon an asserted reliance upon appeals to the general public for the production of these minerals alleged to have appeared in the newspapers, etc."

As I have stated above, the statute does not authorize the recognition of a claim based upon a general solicitation or appeal. This is apparent from the provision itself. It is also apparent from the history of the enactment (which it is unnecessary to detail here) that it was intentionally framed so as to exclude such claims as are referred to by you.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE INTERIOR.

MANUFACTURE OF BEER CONTAINING ONE-HALF OF 1 PER CENT OF ALCOHOL.

By the provision of the Act of November 21, 1918 (40 Stat. 1046), prohibiting the use of food products in the manufacture of beer, it was not intended to include malt liquor which does not contain as much as one-half of 1 per cent of alcohol.

Whether the word "beer," as used in the above provision, includes ale, porter, stout, etc., depends upon whether these latter beverages are ordinarily classed as beer. This is a question of fact and can not be determined as a matter of law.

The Act, *supra*, prohibits the use of food products in the manufacture of all malt and vinous liquors for beverage purposes containing one-half of 1 per cent of alcohol.

The importation of vermuth, cider, fruit juices, and other beverages containing as much as one-half of 1 per cent of alcohol is prohibited by the said Act of November 21, 1918.

A line of demarcation between intoxicating and nonintoxicating liquors, based upon whether they contain as much as or less than one-half of 1 per cent of alcohol, may be prescribed by the Secretary of the Treasury.

DEPARTMENT OF JUSTICE,
July 3, 1919.

SIR: I have the honor to acknowledge receipt of your letter of April 28, asking for an opinion touching certain features of the Act approved November 21, 1918 (40 Stat. 1046). The portion of the Act involved in your request is as follows:

"That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used

in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. The Commissioner of Internal Revenue is hereby authorized and directed to prescribe rules and regulations, subject to the approval of the Secretary of the Treasury, in regard to the manufacture and sale of distilled spirits and removal of distilled spirits held in bond after June thirtieth, nineteen hundred and nineteen, until this Act shall cease to operate, for other than beverage purposes; also in regard to the manufacture, sale, and distribution of wine for sacramental, medicinal, or other than beverage uses. After the approval of this Act no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization: *Provided*, That this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this Act."

The questions which you submit are:

"1. Does the said Act prohibit the use of food products in the manufacture of any and all beverages known as beer; that is to say, is the word beer used as a generic term, descriptive of all malt liquors, or is it limited to the commodity popularly known as beer as distinguished from ale, porter, stout, etc.?"

"2. Does the said Act prohibit the use in the manufacture of malt and vinous liquors for beverage purposes containing one-half of one per cent or more of alcohol?"

"3. Are vermouth, cider, fruit juices and other beverages containing one-half of one per cent or more of alcohol prohibited importation under the said Act?"

"4. If your answers to questions 2 and 3 are in the negative, can a line of demarcation between intoxicating and nonintoxicating liquors be prescribed by the Secretary of

the Treasury based upon the percentage of alcohol contained in such liquors?"

It will be seen from the Act quoted above, which is to be effective until the termination of demobilization, that there are the following prohibitions:

1. That after June 30, 1919, it shall be unlawful to sell for beverage purposes any *distilled spirits* or to remove for beverage purposes, except for export, any such spirits held in bond.

2. After May 1, 1919, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of *beer, wine, or other intoxicating malt or vinous liquor* for beverage purposes.

3. After June 30, 1919, no *beer, wine, or other intoxicating malt or vinous liquor* shall be sold for beverage purposes except for export.

4. After the approval of the Act, no *distilled, malt, vinous, or other intoxicating liquors* shall be imported into the United States.

It will further be seen that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is given express authority to make rules and regulations touching (1) the manufacture and sale of *distilled spirits* and removal of distilled spirits held in bond, for other than beverage purposes, and (2) the manufacture, sale, and distribution of *wine* for sacramental, medicinal, or other than beverage purposes.

No mention is made of rules and regulations to govern the manufacture, sale, or distribution of liquor of any kind for beverage purposes, or of *beer or malt liquors* either for beverage or other purposes. Apparently, this class of liquors is simply left under the inhibition of Congress against their manufacture or sale.

As to importation, there is a broad mandate that "no distilled, malt, vinous, or other intoxicating liquors shall be imported." The act itself makes no mention of rules and regulations for the enforcement of this prohibition. By other laws, however, the Treasury Department is charged with the duty of collecting the taxes on dutiable articles and, in proper cases, seizing articles brought into

the country contrary to law; and the Secretary of the Treasury is empowered to make proper rules and regulations for the discharge of this duty.

It follows that the Secretary of the Treasury is empowered to make all proper and reasonable rules and regulations governing the sale or removal of *distilled spirits* for nonbeverage purposes after June 30, 1919, and the manufacture, sale, and distribution of *wine* for nonbeverage purposes after the dates fixed by the Act. He is also empowered by other laws to make rules and regulations for the purpose of carrying out the prohibition against the importation of intoxicating liquors. And this latter prohibition applies broadly to all intoxicating liquors.

The result is that, in authorizing regulations touching the manufacture and sale of *distilled spirits* and *wine*, Congress has designated the articles to which they shall apply, and has left to the Treasury Department simply the duty of regulating the manner in which these articles may be lawfully manufactured or disposed of. To do this effectively, the Secretary of the Treasury must, of course, adopt proper rules, for the guidance of his agents, in determining what constitutes distilled spirits or wine. I am of opinion, however, that the rules so adopted will be valid or invalid according as they agree or disagree with the recognized definitions of distilled spirits and wine. In other words, a rule of the Treasury Department can not make something distilled spirits or wine which is not within the recognized meaning of those words as used in the act of Congress. And the final determination of that question is one for the courts.

As I have previously advised you, my opinion is that beer and wine are prohibited articles whether intoxicating or not. The words "beer" and "wine," as used in this act, must be taken in their ordinary significance, which denotes beverages having some alcoholic content. It may be safely said, then, I think, that these words can not, for the present purpose, be applied to a beverage containing no alcohol whatever.

While the Treasury Department has not heretofore been concerned with determining what constitutes an *intoxicat-*

ing liquor, it has been, in the administration of the revenue laws, called upon to determine what beverages are subject to taxes levied upon *alcoholic* beverages, including the tax specifically laid on "beer." It long ago adopted the rule that less than one-half per cent of alcohol was too inconsiderable to justify classing a beverage containing it as beer or any other alcoholic liquor. And this has ever since been the basis of its rules and regulations. Manufacturers of malt beverages have, for years, been required to pay the "beer" tax when their product contained as much as one-half per cent of alcohol and not required to pay the tax when it contained less.

Thus, an executive department had for many years ruled that when Congress used the word "beer," it meant beverages brewed from the materials used in the production of beer containing as much as one-half of 1 per cent of alcohol, and that such a beverage containing less than one-half of 1 per cent of alcohol was not beer. In this the brewers had acquiesced, and Congress had continued to use the same word without expressing a purpose to give it any different meaning. And finally, in two recent revenue Acts, one passed before and one after the Act of November 21, 1918, this definition of beer has been expressly recognized by levying a tax on "all beer, lager beer, ale, porter, and other similar fermented liquors containing one-half of 1 per centum of alcohol," and classing as "soft drinks" "all beverages derived wholly or in part from cereals or substitutes therefor, and containing less than one-half of 1 per centum of alcohol." This is obviously what the Treasury Department, the brewers, and Congress had come to understand the word "beer" to mean. And when that word was again used in the Act of November 21, 1918, I think it must be given the same meaning.

The same may be said of the word "wine," except there is perhaps no statute expressly recognizing the definition adopted by the Treasury Department. The practice of the Treasury Department in this respect, however, must be regarded as acquiesced in by Congress when subsequent acts used the same word without attempting to give it a different meaning.

If the Act of November 21, 1918, had stopped with prohibiting beer and wine, I can not doubt that the purpose to prohibit those beverages containing as much as one-half of 1 per cent of alcohol would have been perfectly clear. The question is whether the words "wine" and "beer" must be given a different meaning by reason of the added words "other intoxicating malt or vinous liquors." I am aware of the rule of construction under which general words which follow an enumerations, by words of a particular and specific meaning, are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. But I am not aware that any court has held that when in an enumeration a person or thing is described by words of a particular and specific meaning, those words are to be given a different meaning on account of more general language following the enumeration. In other words, the effect of the rule referred to is to limit the meaning of the general and not the particular language used. Thus, in the present case, the general clause following the enumeration of beer and wine must be construed as including only liquors falling in the same general class as beer or wine. Of course, the general language following the enumeration may be such as to indicate the respect in which the other persons or things intended to be included shall be similar to the ones specifically mentioned. If the added words here had been merely "other malt or vinous liquors," they would perhaps be construed as including all liquors similar to beer or wine in respect to containing malt or being vinous, without regard to their other characteristics. But by using the general language, "other *intoxicating* malt or vinous liquors," Congress has introduced another point of similarity to beer and wine which must exist to bring a given liquor within the terms of the Act. The similarity must be in respect to intoxicating qualities. The intoxicating qualities of any liquor depend upon its alcoholic content. The general language used, therefore, would seem to include any malt or vinous liquor with an alcoholic content similar to that of the beer or wine which the act places under its ban. It must be a liquor which is

intoxicating, but only in the sense that beer and wine, as specified in the Act, are intoxicating. Certainly, it is not necessary for other liquors to have a greater alcoholic content than wine or beer to make the statute applicable to them. Since, throughout the Act, beer and wine are classed with other "intoxicating" liquors, and since as much as one-half of 1 per cent of alcohol brings beer and wine within the prohibition, I conclude that all malt or vinous liquors containing that much alcohol are prohibited, and those containing less are not prohibited. In other words, I think, Congress has, for the purpose of this Act, made the intoxicating qualities of beer and wine, beverages containing as much as one-half of 1 per cent of alcohol, the standard instead of leaving the jury, in each case, to determine whether a particular beverage is, in fact, intoxicating.

I reply to your questions as follows:

(1) The Act referred to prohibits the use of food products in the manufacture of any and all beverages which are within the recognized meaning of the word "beer" as used in the Act of Congress. I am of opinion that Congress used it in the same sense in which it has long been used by the Treasury Department, as not including any malt liquor which does not contain as much as one-half of 1 per cent of alcohol. Whether it includes ale, porter, stout, etc., depends upon whether these latter beverages are ordinarily classed as beer. This is a question of fact and can not be determined as a matter of law. I may add, however, that, in view of the other conclusions reached in this opinion, the question is perhaps not important, for the reason that if these beverages are malt or vinous liquors and contain as much as one-half of 1 per cent of alcohol they are equally prohibited with beer.

(2) I am of opinion that the Act does prohibit the use of food products in manufacture of any malt and vinous liquors for beverage purposes containing one-half of 1 per cent or more of alcohol.

(3) The prohibition against the importation of liquors includes *all intoxicating liquors*. Being of opinion that the Act expresses a purpose to treat as intoxicating all liquors containing as much as one-half of 1 per cent of alcohol, I

am of opinion that vermuth, cider, fruit juices, and other beverages are prohibited importation if they contain that much alcohol. I do not mean now to express an opinion as to whether cider is included in the prohibition against manufacture and sale in this country: I have that question now under consideration and will advise you later.

(4) I am of opinion that you can prescribe a line of demarcation between intoxicating and nonintoxicating liquors, based upon whether they contain as much as or less than one-half of 1 per cent of alcohol.

Since this opinion was prepared, the United States District Court for the Southern District of New York, in overruling a motion to dismiss a bill seeking an injunction against the enforcement of the Act of November 21, 1918, has rejected the construction I have placed upon that act and expressed the opinion that whether beer, wine, or any other malt or vinous liquor is prohibited depends upon whether it is, in fact, intoxicating. If that decision is adhered to, however, and an injunction granted, an appeal will immediately be taken, and it is my purpose to maintain in the courts the views herein expressed until the question is finally determined. In the meantime, it is my advice that you act upon the construction of the statute which I have indicated.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.

NAVAL OFFICER SERVING AS BUREAU CHIEF OR JUDGE
ADVOCATE GENERAL—RANK ON RETIREMENT.

A line officer of the Navy, retired while serving as Chief of Bureau or Judge Advocate General, should be placed on the retired list with the rank attached by law to the said position of Chief of Bureau or Judge Advocate General.

DEPARTMENT OF JUSTICE,

July 3, 1919.

SIR: I have the honor to acknowledge the receipt of your letter of May 14, requesting my opinion as to the rank to which a line officer of the Navy is entitled when placed on the retired list while serving as Chief of Bureau or Judge

Advocate General in the Navy Department, with the rank of rear admiral while so serving, although his lineal rank in the service is lower than that of rear admiral.

In your letter, and in the opinion of the Judge Advocate General of the Navy submitted with it, the statement is made that there are previous opinions of this department directly bearing upon the subject, but inconsistent with each other. It is proper, therefore, to first consider these opinions.

These opinions are, in the last analysis, based upon a construction of section 1457, Revised Statutes, which is a part of Title XV relating to the Navy, chapter 3 relating to retired officers of the Navy, and provides:

“Officers retired from active service shall be placed on the retired list of *officers of the grades to which they belonged respectively at the time of their retirement*, and continue to be borne on the Navy Register. They shall be entitled to wear the uniform of *their respective grades*
* * *.”

The italicized words in the statute are the important ones in so far as the previous opinions of this Department are concerned.

Before considering these opinions, it will be of aid to make a quotation from the opinion of the Court of Claims in *General Wood's Case*, 15 Ct. Clms. 151, 159–160, not only because it is a leading case in itself, but also because it has in effect the indorsement of the Supreme Court in *Wood v. United States*, 107 U. S. 414:

“Rank is often used to express something different from office. It then becomes a designation or title of honor, dignity, or distinction conferred upon an officer in order to fix his relative position with reference to other officers in matters of privilege, precedence, and sometimes of command, or by which to determine his pay and emoluments. This is the case with the staff officers of the Army. Section 1131 of the Revised Statutes provides that there shall be five inspectors general, with the rank of colonel of cavalry. The office thus provided for is inspector general, and not colonel of cavalry. The latter is a designation

with entirely different legal effect from that which the same words express when used to describe an office; that is to say, he receives the pay and is entitled to the dignity, but has not the office, with its command and other duties, of a colonel of cavalry. In the same manner the Judge Advocate General has the rank of brigadier general (Rev. Stat., sec. 1198), and chaplains have the rank of captains of infantry. (Rev. Stat., sec. 1122.) The Adjutant General has the rank of brigadier general, and the assistant adjutant generals the rank of colonel, lieutenant colonel, or major of cavalry. (Rev. Stat., sec. 1128.) So with officers of the Quartermaster's Department and the Medical Department, who have rank attached to, but separate and distinct from, their office. (Rev. Stat., secs. 1132, 1168.)

"The distinction between rank and office is thus more clearly apparent with reference to staff officers than to officers of the line, because in the latter case the words used to designate the rank and the office are usually the same, while in the former case they are always different. * * *

"Grade is a step or degree in either office or rank, and has reference to the divisions of the one or the other or both, according to the connection in which the word is employed.

"Thus, section 1129 of the Revised Statutes provides that all vacancies in the grade of major, in the Adjutant-General's Department, shall, when filled, be filled by selection from captains of the Army. In that department the grade of major is the rank of the thirteen assistant adjutant-generals of the lowest rank; and therefore grade there refers to rank. Section 1168 provides that all original vacancies in the grade of assistant surgeons shall be filled by selection, by examination, from among the persons who have served as staff or regimental surgeons of volunteers in the Army of the United States during the late war; and in that section grade refers to office, as no rank is mentioned."

It will be seen that a class exists in the Army and Navy which does not have to do with the actual maneuvering of a regiment or a ship of war, but which performs serv-

ices deemed equally essential to that end, e. g., paymasters, surgeons, chaplains, constructors, etc. There were, and are, reasons, based upon the efficiency of the service, looked at as a whole, why a rank should be given to this class commensurate with the rank given to the class which actually exercised command. The difficulty was that, in the case of an officer actually exercising command, his office or title correctly represented his rank, except in exceptional cases. In the case, however, of e. g. paymasters, surgeons, etc., the title or office indicated no rank in the Navy as a whole. The same was, of course, true of the chiefs of bureaus when such offices were created; e. g. the Chief of the Bureau of Medicine and Surgery had the title and office as such, but he had *as such* no rank of e. g. lieutenant, commander, captain, etc. It was deemed necessary, therefore, to attach to the title or office of such persons a rank which should fix their precedence, pay, etc., and thus bring them in line with the rest of the service. For a clear discussion of this matter the opinion of Attorney General Devens in the case of the commissions to pay inspectors, 16 Op. 414, should also be consulted.

In 17 Op. 154, Attorney General MacVeagh had under consideration the case of Whiting, a captain in the line, but Chief of the Bureau of Navigation with a *relative* rank as such chief of commodore (R. S. 1472). The question was as to his rank and pay on retirement, either on his own application or for disability, while such chief. It was held that his rank on retirement was captain and his pay according to such rank. The opinion can not be regarded as entirely satisfactory, since it no where gives a clear reason for the conclusion reached. In the main it is based upon the use of the word "grade" in R. S. 1457, *supra*, which in Whiting's case, it is said, was his lineal office "and not that of the relative rank incidental to his temporary occupation of another and distinct office," because it is by virtue of his lineal office that he is entitled to promotion and retirement. The connection of the reason given with the conclusion is not apparent. It is true that promotion and retirement statutes deal with the office, either lineal or

staff, but it does not follow that rank on retirement is the same as such lineal office. As a matter of fact, in many cases it is not.

The opinion also seems to lay considerable stress on "*relative* rank," which was the term used in the statutes at that time, but this is no longer of significance, since the Navy personnel act of March 3, 1899 (30 Stat. 1004), has substituted "absolute" for "relative" rank in such cases.

Reference is also made to R. S. 1473, which expressly provides for the rank on retirement of chiefs of four of the bureaus for age or length of service, but as this point is also made in the later opinion of Attorney General Wickersham consideration of it will be postponed.

The opinion is somewhat weakened by its manner of treatment of R. S. 1588 relating to the pay of retired officers and basing it on "*grade or rank*." It is said that rank here must mean "*grade*" as previously defined in the opinion, since Congress can not have intended to use "*grade*" in R. S. 1588 with a different meaning from that in R. S. 1457; but it might be said, with even greater force perhaps, that "*grade*" in R. S. 1457 must be synonymous with "*rank*" since it is plainly synonymous with it in R. S. 1588.

In 25 Op. 294 Solicitor General Hoyt had under consideration the question of the titles to be borne by the chiefs of the so-called staff bureaus of the Navy on retirement. He held that their titles on the retired list must be the same as those given them by law while in active service, e. g., paymaster general, etc. While the real scope of the opinion may not be entirely clear, it is expressly stated that an officer serving as chief of bureau, if retired during his incumbency of that position, would be retired with the *rank*, pay and title of rear admiral. However, Attorney General MacVeagh's opinion, *supra*, is not cited.

In 27 Op. 376 Attorney General Wickersham had under consideration the case of Barton who, while Chief of the Bureau of Steam Engineering, was retired for physical incapacity. His lineal office at that time was captain. It was held that his rank on retirement was that of captain,

and not rear admiral, the rank attached to his position as chief of bureau. This opinion also seems not wholly satisfactory because it does not clearly state upon what distinct ground it is based. Considerable stress is laid upon R. S. 1473, providing specially for the retirement of the chiefs of four bureaus. In the main, however, the opinion seems based on the grounds that the office of chief of engineers is not a "grade," and that the rank of rear admiral is only temporarily attached to its incumbent while he holds the position. No reason, however, is given for the statement that the office of Chief of the Bureau of Steam Engineering is not a "grade." It cannot be because there is only one such officer, since, as the opinion points out, R. S. 1362 provides for the "grade" of admiral. Moreover, Congress subsequently, by act of May 6, 1910, authorized the President to appoint Barton "engineer in chief, retired, with rank of rear admiral" (36 Stat. 352). It can not be because the office is in the staff, or because of its special nature, because in *Roget v. United States*, 148 U. S. 167, cited in the opinion, the office of professor of mathematics is held to be a "grade," and in *Gibson v. United States*, 194 U. S. 182, the same is held of rear admirals of the lower nine. The other reason given seems also inconclusive, viz., that the rank of rear admiral is only attached to the incumbent while he holds the position. It follows that when he leaves the position for other active service he loses the rank; but it does not necessarily follow that he likewise loses it when he is retired while holding the position. That depends on the construction to be given to R. S. 1457.

These three opinions confine themselves rather closely to the language of R. S. 1457. This section, however, can not be correctly interpreted without considering more fully the general legislation on the subject of chiefs of bureau in the Navy and of retirement in both the Army and Navy.

Bureaus in the Navy Department were first created by the act of August 31, 1842, 5 Stat. 579. This act created five bureaus, viz., yards and docks, construction, provisions and clothing (pay), ordnance, and medicine, and

authorized the President to appoint chiefs thereof; in the case of yards and docks, and ordnance, from the captains in the naval service; in the case of construction, a skilled naval constructor; in the case of medicine, from the surgeons of the Navy; in the case of provisions, from the general public. By the act of July 5, 1862, 12 Stat. 510, the number of bureaus was increased to eight by adding equipment and recruiting, navigation, and steam engineering. Of the new bureaus, the chiefs of equipment and of navigation were to be appointed from line officers, engineering from the chief engineers of the Navy, while the chief of the bureau of provisions was now required to be taken from the paymasters of the Navy. By section 10 of the act of March 3, 1871, 16 Stat. 537, it was provided that chiefs of bureaus might be appointed from "officers having the relative rank of captain in the staff corps of the Navy on the active list." The rank of the chiefs of bureaus was first fixed by the act of March 3, 1871, referred to hereinafter.

The first act providing for retirement in the Navy appears to be that of February 28, 1855, 10 Stats. 616, which created a retiring board for officers incapacitated for service. It applied only to certain line officers, e. g., captain, commander, etc., referring to these positions in section 1 as "grades," in section 2 as "offices, ranks, or grades." They were to be placed on a retired list "in the order of their rank and seniority at the time," and to receive certain pay "to which they may be entitled when so placed."

The act of August 3, 1861, 12 Stat. 287, dealt more comprehensively with retirement both as relates to the Army and the Navy. By section 15 any officer of the Army or Marine Corps, and by section 21 any officer of the Navy who had served 40 years, might, on his own application, be placed on the retired list with the pay and emoluments referred to later. By section 16 any officer of the Army or Marine Corps might be retired for incapacity, in which case he was to receive the pay "of the highest rank held by him at the time of his retirement, whether by staff or regimental commission." By section 22 a similar provision was

made for retiring officers of the Navy for incapacity, but their retired pay was fixed specifically by the title, office, grade, or rank (whichever term is preferred) held by them, as, e. g., "captains in the Navy," "surgeons ranking with captains," "surgeons ranking with commanders," etc.

The law having thus fixed two classes of retirement in the Navy, viz., for incapacity, and on application after 40 years' service, the act of December 21, 1861, section 1, 12 Stat. 329, added a third, viz., compulsory retirement at the age of 62 after 45 years' service, such an officer to be placed on the retired list "*of officers of the grade to which he belonged at the time of such retirement.*" This statute is, therefore, the genesis of the particular language on the subject used in R. S. 1457. It, however, applied to only one class of retired officers, nor is there any indication that Congress used the words "officers of the grade" in any new or peculiar sense. On the contrary section 12 of the act of July 17, 1862, 12 Stat. 596, used precisely the same language as to officers of the Army or Marine Corps retired for the same causes. This is important in view of Mr. Wickersham's statement in 27 Op. 382 (necessary if the decision in *Remy's Case*, 33 Ct. Clms. 218, be sound), that there is a difference in this respect between the Navy and the Marine Corps.

By section 5 of the act of July 15, 1870, 16 Stat. 333, the pay of all retired officers of the Navy was fixed with reference to the pay for "officers on the active list whose grade corresponds to the grade held by such retired officers respectively at the time of such retirement." Section 16 of this Act provided:

"That the chiefs of bureaus in the Navy Department shall be entitled to the pay of commodores on shore duty, and, if retired from said office by reason of age or length of service, to the retired pay of that grade."

The above provision of section 5 was simplified in the naval appropriation act of March 3, 1873, 17 Stat. 547, by referring the pay of retired officers to the pay "*of the grade or rank which they held at the time of their retirement.*" If Congress intended any change by the use of

this language it was certainly not in the direction of restriction.

The naval appropriation act of March 3, 1871, 16 Stat. 535-538, reorganized to some extent the staff corps of the Navy. As to the medical corps it provided, e. g., for "medical directors who shall have the relative rank of captain," as to the engineer corps, e. g., "*chief engineers who shall have the relative rank of captain,*" "*chief engineers who shall have the relative rank of commodore.*" Of the naval constructors it said, "two shall have the relative rank of captain, three of commander, and all others that of lieutenant commander or lieutenant." Section 10 then provided:

"That *the foregoing grades* hereby established for the staff corps of the navy, shall be filled by appointment from the highest numbers in each corps, according to seniority, and that new commissions shall be issued to the officers so appointed, in which commissions *the titles and grades* herein established shall be inserted."

It is conducive to clearness to stop at this point to consider this legislation. Here we have created offices of, e. g., "medical directors," "pay inspectors," "chief engineers," "naval constructors," with no provision for their position in the general scheme of the Navy, unless the added words, e. g., "with the relative rank of captain," cover this omission. We then have the reference in section 10 to the foregoing establishment as one of "grades" and "titles" which must be specified in the commission. What "grades" and "titles" are referred to? An authoritative answer is given by the Supreme Court in *Gibson v. United States*, 194 U. S. 182. It was there held, affirming the judgment of the Court of Claims, that the word "grade" in a statute similar in this respect to section 10, *supra*, and to R. S. 1457 meant, not rear admirals as a whole, but rear admirals of the lower nine, because the legislation, looked at as a whole, established such a "grade." Therefore, it is clear both as a matter of common sense and of authority that the "grades" referred to in section 10 of the act of March 3, 1871, are, e. g., "pay directors with the rank of captain;"

“chief engineers with the rank of commander;” “chief engineers with the rank of lieutenant commander,” etc., etc. It is just as clear that if any officer holding such a “grade” became subject to retirement under the provisions of section 1 of the Act of December 21, 1861, *supra* (the genesis of R. S. 1457), he would necessarily be retired as of such a “grade.” Is not the same conclusion necessarily true of chiefs of bureaus, in so far as the nature of the office is concerned?

The same act of March 3, 1871, went on to provide by section 11 that the officers of the medical, pay, and engineer corps, naval constructors, chaplains and professors of mathematics should, when retired under certain circumstances, “have the relative rank of commodore; and staff officers who have been or shall be retired for causes incident to the service before arriving at sixty-two years of age shall have the same rank on the retired list as pertained to their position on the active list.” Section 12, which is of special importance on your particular question, provided as follows:

“That the chiefs of the bureau of medicine and surgery, provisions and clothing, steam engineering, and construction and repair, shall have the relative rank of commodore while holding such position (*or if heretofore or hereafter retired therefrom by reason of age or length of service*), and shall have, respectively, the title of surgeon-general, paymaster-general, engineer in chief, and chief-constructor: Provided, That when the office of chief of bureau is filled *by a line officer below the rank of commodore, said officer shall have the relative rank of commodore during the time he holds said office: And provided further*, That the pay of chief of bureau in the Navy Department shall be the highest pay of the grade to which they belong, but not below that of commodore.” (16 Stat. 537.)

The statutes referred to have been carried into the Revised Statutes in substances as they stood. There is no indication that the revisers intended or attempted to change the general substance of the prior legislation.

It seems clear, when these statutes are considered as a whole and in their order, that Congress intended:

(a) As a general thing to equalize the grade or rank of an officer of the Navy on retirement with that enjoyed by him at the moment of his retirement;

(b) To use the word "grade" as a general term indicating any marked distinction fixed by law among officers which would be expressed in their commission, title, or pay, not excluding chiefs of bureau having a certain rank;

(c) Not to make any distinction between one occupant of a bureau office and another because of the line or staff source from which he came.

All the pertinent legislation subsequent to the Revised Statutes seems to confirm this view. Only one provision need be referred to.

The naval appropriation act of May 13, 1908, 35 Stat. 128, provided:

*"Provided further, That the pay and allowances of chiefs of bureaus in the Navy Department shall be the highest pay of the grade to which they belong, and not below that of rear admiral of the lower nine, * * * .*

When an officer of the Navy has been thirty years in the service, he may, upon his own application, in the discretion of the President, be retired from active service and placed upon the retired list with three-fourths of the highest pay of his grade: And provided further, That any officer of the Navy who is now serving or shall hereafter serve as chief of a bureau in the Navy Department, and shall subsequently be retired, shall be retired with the rank, pay and allowances authorized by law for the retirement of such bureau chief."

Thus all bureau chiefs without exception are given at the lowest the pay of a grade similar to that fixed in the act of March 3, 1871, R. S. 1471, 1472, 1473, and it is assumed that they are all without exception retired by special provision. The second proviso refers to their retired rank as in the same class as their retired pay, and the first proviso fixes their active pay with reference to the pay of rear admirals of the lower nine (commodores). It is impossible to draw any other conclusion from this legislation than that Congress intended to confirm the general tenor of

prior legislation to the effect that chiefs of bureau, retired while holding such positions, went on to the retired list as such, with the title, rank, pay, etc., appertaining to the position. Consequently, in 28 Op. 531, 532, Solicitor General Bowers, after referring to the above provisions of the act of May 13, 1908, said:

"It is obvious under the language last quoted that an officer actually retired from active service while still acting as chief of bureau became entitled, before the new enactment of 1910, to pay during retirement of not less than three-fourths of the pay of a 'rear-admiral of the lower nine.'"

The only provision, however, regulating such pay which he could have had in mind was section 1588, based on section 1 of the act of March 3, 1873, *supra*, and that section merely fixes the pay on the basis of the "grade or rank" held by the officer at the time of his retirement. Since "grade" and "rank" are used synonymously in this statute, Mr. Bowers must have thought that the legislation of May 13, 1908, recognized the office of chief of bureau with the rank of rear admiral as a "grade."

The above deals only with Chiefs of Bureau, but your question also involves the Judge Advocate General of the Navy. It is only necessary to say that this officer is appointed for four years from either the Navy or the Marine Corps "with the rank and highest pay of a captain in the Navy or the rank, pay and allowance of a colonel in the Marine Corps, as the case may be."¹ There are no special provisions as to his retirement.

Two decisions must now be considered in the light of the above discussion of the statutes and of the opinions of this Department. Both of them were considered by Mr. Wickersham in his opinion holding that chiefs of bureau, falling outside the provisions of R. S. 1473, must be retired with their lineal rank.

In *Remey's Case*, 33 Ct. Clms. 218, the Court of Claims had before it the case of a marine officer appointed Judge

¹ The rank and pay have been increased by the Naval Appropriation Act of July 1, 1918, 40 Stat. 717.

Advocate General of the Navy and retired while holding that position. The statute governing the question was R. S. 1254 which provides:

“Officers hereafter retired from active service shall be retired upon the actual rank held by them at the date of retirement.”

It was held that Remey’s “actual rank” was that of colonel in the Marine Corps with the pay attached thereto. The Court said:

“The plaintiff (21 Stat. L., p. 164) was ‘appointed’ for four years ‘Judge-Advocate-General of the Navy, with the rank, pay, and allowance of a * * * colonel in the Marine Corps.’ When he was retired, he was in law and fact a colonel in the Marine Corps. The further fact that this commission was limited as to time does not change the other fact that at the moment of retirement he was a colonel. Section 1254 (Rev. Stat.) provides that he must be retired ‘upon the actual rank held by them (him) at the date of retirement.’ Actual rank is the test, a test made evidently to exclude assimilated rank as a measure of pay. Remey’s rank as Judge-Advocate-General and colonel was not an assimilated rank but an actual rank, for the statute directs that the Judge-Advocate-General shall have the rank, the pay, and the allowances of a captain in the Navy or of a colonel in the Marine Corps, as the case may be. (21 Stat. L., p. 164.) Then at the date of his retirement the actual rank (as distinguished from assimilated rank) held by Remey was that of a colonel in the Marine Corps; as such the President retired him, as he had a right to do.”

This decision of the Court of Claims is distinguished by Mr. Wickersham solely upon the ground that section 1254, Revised Statutes, relating to the Army refers retirement to “actual rank,” while section 1457, Revised Statutes, relating to the Navy refers retirement to “grades.”

The result of such a distinction, viz., that an officer of the Marine Corps appointed Judge Advocate General must be retired with the rank attached to said position, an officer

appointed chief of certain so-called staff bureaus must be retired with the same honors, but an officer of the *Navy* appointed Judge Advocate General or appointed to a so-called line bureau must be retired with the title, rank, pay, etc., pertaining to the office held by him before he became chief of bureau, is such as to justify a very grave doubt as to the validity of the conclusion. To base such a conclusion, in view of this doubt, upon a mere difference between the terms "grade" and "rank" in statutes relating to the Army and Navy is to rely on words rather than on the real intent of Congress.

As a matter of fact, section 1254, Revised Statutes, which received a liberal construction by the Court of Claims in *Remey's Case*, was copied varbatim from the act of June 10, 1872, 17 Stat. 378, which was meant to be restrictive of the prior act of July 28, 1866, section 32, 14 Stat. 337, which allowed officers of the Army retired on account of wounds received in battle to be retired on the full rank of the command held by them at the time they received their wounds. (See also act of March 3, 1875, 18 Stat. 512.) "Actual rank" therefore had a definitely restricted meaning in section 1254, Revised Statutes to distinguish it from the so-called brevet ranks occasioned by the English, Mexican and Civil Wars. (See *General Wood's Case*, *supra*.) Yet the Court of Claims thought the term covered the temporary rank held by the incumbent of the Judge Advocate General's Bureau.

As has been shown above, there is nothing in the manner in which Congress has employed the word "grades" to indicate that it intended a difference between those officers who retired with their "grade" and those officers who retired with their "actual rank."

In *Lemly's Case*, 8 Compt. Dec. 895, Assistant Comptroller Mitchell held that an officer of the line of the Navy, appointed Judge Advocate General, was properly retired with the rank of captain pertaining to that position. He was of the opinion that this is settled by *Remey's Case*, *supra*, and states that it is in accordance with the principle adopted

by his office as to chiefs of bureau, citing 5 Compt. Dec. 821. The explanation of this opinion given in Mr. Wickersham's opinion (27 Op. 382) is quite incorrect. Lemly's pay on the active list was based on "the grade from which he was retired." It was necessary, therefore, for the Assistant Comptroller to determine what his "grade" on the retired list was, and, as a matter of fact, Lemly served after his retirement in active positions other than that of Judge Advocate General.

The point on which stress is laid in the opinions of Mr. MacVeagh and Mr. Wickersham, viz., that since Revised Statutes 1473 specifically provides that chiefs of four of the bureaus shall be retired with the rank of commodore, therefore Congress can not have intended to confer the same privilege on the chiefs of the other four bureaus, or on the Judge Advocate General, besides imputing to Congress an intention to make a discrimination for which no possible reason can be suggested, loses its force when the act of March 3, 1871 (which is the source of R. S. 1471, 1472, 1473 and 1482), is read as a whole in the light of the situation existing when it was passed. When this is done with a desire to ascertain the actual intention of Congress, the proper inference will be seen to be that Congress intended, not to discriminate between one chief of bureau and another, but to confer upon the chiefs of the so-called staff bureaus a grade or rank on retirement which it thought already appertained to the chiefs of the so-called line bureaus.

In view of the above, I have reached the conclusion and so advise you that a line officer of the Navy, retired while serving as Chief of Bureau, or Judge Advocate General, should be placed on the retired list with the rank attached by law to the said position of Chief of Bureau, or Judge Advocate General.

Respectfully yours,

A. MITCHELL PALMER.

To the SECRETARY OF THE NAVY.

**EXCISE TAX—SALES TO A STATE OR A POLITICAL
SUBDIVISION THEREOF.**

The excise tax imposed by section 900 of the Act of February 24, 1919 (40 Stat. 1122), upon sales by manufacturers, producers, or importers of the articles enumerated in said section, applies to sales of such designated articles to a State or a political subdivision thereof, except those articles specified in subdivision 10 of the section.

DEPARTMENT OF JUSTICE,
July 7, 1919.

SIR: I have the honor to acknowledge receipt of your letter of May 14, requesting my opinion upon the question whether the excise tax imposed by section 900 of the revenue act of February 24, 1919 (40 Stat. 1122), upon the manufacturer, producer, or importer upon the price for which articles enumerated in the section are sold, applies upon sales of such taxable articles to a State or a political subdivision thereof.

Section 900 provides (40 Stat. 1122):

“That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—”

Then follow a number of subdivisions specifying various articles and the rate per centum of the tax levied thereon. Subdivision 10 of the section is as follows:

“Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, the District of Columbia, or any foreign country while engaged against the German Government in the present war, 10 per centum;”

Section 903 (40 Stat. 1123) provides:

“That every person liable for any tax imposed by section 900, 902, or 906, shall make monthly returns under oath in duplicate and pay the taxes imposed by such sections to the collector for the district in which is located the principal place of business. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.”

It is my opinion that this tax applies to sales to a State or a political subdivision thereof, except those articles embraced by subdivision 10.

The exception contained in subdivision 10 indicates the congressional intent that the tax shall apply to the articles specified in the other subdivisions.

The United States, of course, can not tax the property or the instrumentalities of a State, but here the tax is not laid upon either the property or the instrumentalities of the State. If it reaches the State at all it does so only in an indirect manner. The tax is laid upon the manufacturer, and while it is probable that he will pass it on to the consumer; the tax itself is not laid upon the consumer. The burden, therefore, if it falls upon the State, does so indirectly. Such an incidental and indirect effect results from the payment of all taxes, and while this tax may be traced more directly into the cost to the State, yet the fact remains that it is an incidental and indirect burden upon the State and not the taxation of either its property or its instrumentalities. *Snyder v. Bettman*, 190 U. S. 249; *Baltic Mining Company v. Massachusetts*, 231 U. S. 68; *Kansas City, Fort Scott & Memphis Railway Company v. Kansas*, 240 U. S. 227; *The American Manufacturing Company v. The City of St. Louis*, decided by the Supreme Court on June 9.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.

JURISDICTION OF NAVAL COURT-MARTIAL OVER PERSONS
DISCHARGED FROM THE SERVICE.

A person discharged from the naval service before proceedings are instituted against him for violations of the Articles for the Government of the Navy, excepting Article 14, can not thereafter be brought to trial before a court-martial for such violations, though committed while he was in the service.

DEPARTMENT OF JUSTICE,

July 10, 1919.

SIR: I have the honor to acknowledge the receipt of your letter of May 13, requesting my opinion on the fol-

lowing question of law arising in the administration of your Department:

"Whether a person in the United States Navy or in the United States Naval Reserve Force, and subject to the laws and regulations for the government of the Navy, who commits an offense against such laws and regulations, can be brought to trial before a naval general court-martial, or otherwise punished for the offense, after he has been discharged from the Navy, or released from active duty therein, but within two years after the date of the commission of such offense."

Your letter was accompanied by a memorandum prepared by the Judge Advocate General of the Navy, in which a specific case is stated as pending before you. As that case is one involving merely the jurisdiction of a naval court-martial over an officer discharged from the service before (as I assume) proceedings for violation of the Articles for the Government of the Navy had been instituted against him, I confine myself to this question and have not considered the hypothesis of other punishment for the offense or of a member of the Naval Reserve Force released, during time of war or national emergency, from active service.

Whether, as a general matter, a member of the military or naval forces is, or should be, subject to the jurisdiction of a court-martial for offenses committed while in the service, where prosecution is not instituted until after he has left the service, is a matter on which the authorities are not agreed. The following support the jurisdiction:

In Tytler's *Essay on Military Law*, third edition, pages 113, 114, it is said that the jurisdiction of a court-martial after discharge from the service was determined by the unanimous opinion of the 12 judges in *Lord George Sackville's Case* (1760) to the effect that "they saw no ground to doubt of the legality of a court-martial in those circumstances." However, in Mahon's *History of England* (an authority on the period), it is said (vol. 4, p. 179):

"When, in the February ensuing, the promised court-martial met, a doubt was started (not on Lord George's side), and was referred to the judges, whether a man no

longer in the army could be subject to military law, the judges gave their opinion, that, so far as they could then see, the trial might proceed, but they reserved to themselves a further consideration, if any appeal should be made from the sentence."

The authority of *Sackville's Case* is denied in an able opinion of Attorney General Cushing (8 Op. 328, 329, 330), because it does not appear what the "circumstances" were which determined the judges, it being possible that the court-martial was created by royal prerogative, or that it differed from ordinary courts-martial as being ordered at Lord George's own request.¹

In Winthrop on Military Law, second edition, page 117, note 2, it is stated that *Sackville's Case* has not been followed in the later English law, but he cites no authority. However, in *Parker v. Clive*, 4 Burrows 2419 (1769), Lord Mansfield, in holding that an army officer did not have an absolute right under all circumstances to resign his commission, said that if that were the case he would be able to avoid subjection to military law.

It seems clear, therefore, that *Sackville's Case* can not be accepted as a satisfactory authority.

In this country, the jurisdiction of courts-martial after discharge of the subject from the service has been approved in persuasive opinions by De Hart in his Treatise on Military Law (1862 ed.), pages 28-30 (although it is doubtful whether the author intends to go beyond cases where jurisdiction has attached before discharge), by Judge Wilde, of the Supreme Court of Massachusetts (with the concurrence of the chief justice and Judge Putnam), in *Walker's Case* (3 Am. Jurist 281); by Judge Deady, in *Bird's Case* (2 Sawyer, 33); and perhaps by Attorney General Black, in 9 Op. 181, 182, 183. In none of the above cases, however, was it necessary to pass upon the point.

On the other hand, the jurisdiction is denied by Winthrop in his Treatise on Military Law, Vol. I, page 117;

¹ See E. S. 1230, conferring jurisdiction on a court-martial under such circumstances.

by Davis, *Military Law* (3d ed.), pages 58, 59; and by Dudley, *Military Law* (1908), page 33, paragraph 64.

In 5 Op. 55, Attorney General Toucey had under consideration the case of Capt. Foster, charged with murder while with the forces in Mexico, and whether he could be in any way punished for his offense. After holding that he was not amenable to the ordinary criminal courts, the Attorney General said:

"If it were an offence against the rules and articles for the government of the army, as prescribed by Congress, then, as Captain Foster and the volunteer force have been by law disbanded and mustered out of the service, and the military commission organized for his trial been dissolved, and can not be revived, it is obvious, for both these reasons, that he can no longer be brought to trial upon a charge as for a military offence."

This opinion is somewhat weakened by the fact that in the actual case presented the jurisdiction of the military tribunals had attached while the defendant was still in the service. Under such circumstances it seems to be settled (as will be shown later) that a change of status does not oust the jurisdiction, so that the conclusion of the Attorney General on the case before him was apparently incorrect.

In 8 Op. 328, referred to above, Attorney General Cushing expressed grave doubt as to the existence of the jurisdiction without an express provision of law conferring it, pointing out that military courts are special and limited in their jurisdiction, and have not the implied jurisdiction of general courts of law and equity.

In 24 Op. 570, Attorney General Knox had before him the case of Capt. Brownell, who was alleged to have been guilty of unlawful homicide while serving with the Army engaged in the suppression of the Philippine insurrection. He said:

"It seems to be clear from the authorities that no military court can now try Captain Brownell.

"(1) Because a court-martial has no jurisdiction, since he has left the service (5 Opin. 58); and

“(2) Because a military commission has no jurisdiction now that peace has been proclaimed in the Philippines.”

The most important circumstance weighing against the existence of the jurisdiction is the action of those authorities whose duty it is to interpret and administer the military law. Thus the Judge Advocate General of the Army has from the beginning and uniformly held that a person separated from the service ceases to be amenable to military jurisdiction (Winthrop Dig. J. A. G., ed. 1895, p. 321, par. 5), and I understand from the memorandum of the Judge Advocate General of the Navy that the practice in your department has been the same. This uniform action of administrative officers denying a jurisdiction claimed to exist in their own Department is of the greatest weight in a doubtful case, and I do not think it can be denied that the present case is one where the law is, to say the least, doubtful as to the military jurisdiction.

It is settled, as stated by the Supreme Court in *Ex parte Watkins* (3 Pet. 193, 209), that a court-martial is “one of those inferior courts of limited jurisdiction, whose judgments may be questioned collaterally. They are not placed on the same high ground with the judgments of a court of record.” In *Runkle v. United States* (122 U. S. 543, 555, 556) the court used the following language to the same effect:

“A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. 3 Greenl. Ev. § 470; *Brooks v. Adams*, 11 Pick. 441, 442; *Mills v. Martin*, *supra*; *Duffield v. Smith*, 3 S. & R. 590, 599. * * * To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. *Dynes v. Hoover*, 20 How. 65, 80; *Mills v. Martin*, 19 Johns 33. There are no presumptions in its favor so far as these matters are

concerned. * * * Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively."

It is necessary, therefore, before jurisdiction of courts-martial over persons no longer in the military service can be asserted, that specific statutory authority for it should be found. It can not be derived merely from inference or from general considerations of public policy.

The only statutory authority for the jurisdiction of naval courts is found in the Articles for the Government of the Navy, Revised Statutes, Title XV, chapter 10. The main and typical articles prescribing offenses and their punishment are articles 4, 8, and 14.

Article 4 provides:

"The punishment of death, or such other punishment as a court-martial may adjudge may be inflicted on any person in the naval service—

"First. Who makes, or attempts to make * * * any mutiny" etc., etc.

Article 8 provides:

"Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy—

"First. Who is guilty of profane swearing," etc.

Article 14 provides:

"Fine and imprisonment, or such other punishment as a court-martial may adjudge, shall be inflicted on any person in the naval service of the United States—

"Who presents * * * any claim against the United States * * * knowing such claim to be false or fraudulent," etc.

While these provisions do not expressly confer the jurisdiction now in question, neither do they expressly exclude it. When articles 4, 8, and 14 are compared with other articles punishing military offenses, as, for example, articles 9, 11, 16, 17, 19, it will be seen that to get their real meaning they must be slightly transposed. When this is done, they will read as follows:

Article 4:

Any person in the naval service who makes any mutiny shall be punished by death or such other punishment as a court-martial may adjudge, etc.

Article 8:

Any person in the Navy who is guilty of profane swearing shall be punished as a court-martial may adjudge, etc.

Article 14:

Any person in the naval service of the United States who presents any claim against the United States knowing such claim to be false or fraudulent shall be punished by fine and imprisonment or such other punishment as a court-martial may adjudge, etc., etc.

When so read, these articles simply follow the general principle, represented in the Constitution by the *ex post facto* clause, that criminality depends upon the relation to the laws of the actor at the time the offense is committed; or, in the present class of cases, upon his status at that time. A corollary to this same principle is that criminality is not avoided, as a general thing, by a subsequent change of the status of the actor. Articles 4, 8, and 14, therefore, do not, in their main provisions, contain anything indicating an intention to limit the jurisdiction over military offenses to the period of military service.

The difficulty, however, is that paragraph 11 of article 14 provides:

"And if any person, being guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed."¹

A proviso of somewhat similar purport is inserted in article 62 (fixing a period of limitation in cases of desertion), viz:

"Provided, that said limitation shall not begin until the end of the term for which such person was enlisted in the service." (28 Stat. 680.)

¹ *In re Bogart* (2 Sawyer, 396), sometimes cited as sustaining the jurisdiction generally, in reality rests on paragraph 11.

These provisions, extending the jurisdiction after severance from the service in certain cases only, seem to indicate, on well-known principles of construction, that Congress did not intend so to extend the jurisdiction in other cases.

Article 61 provides that no person shall be tried by court-martial for any offense committed more than two years before the issuing of the order for trial. This article may, with some force, be said to provide, by implication, affirmatively, viz, that any person committing an offense within two years before the issuing of the order for trial may be tried therefor, whether he has left the service or not.

Article 61 was first enacted by the act of February 25, 1895 (28 Stat. 680), before which time there was no statute of limitations for violations of the Articles for the Government of the Navy. If, before that time, there was no court-martial jurisdiction over persons who had left the service before order for trial had been issued, it is doubtful whether the mere fixing by Congress in 1895 of a general period of limitation should be taken to indicate an intention to extend the basic jurisdiction over a class not subject to it theretofore. It is possible that the attention of Congress was not at all engaged with the subject of such basic jurisdiction.

It appears to be well settled, as said by the Supreme Court in *Carter v. McClaughry* (183 U. S. 365, 383), that where jurisdiction has once attached it can not be divested by mere subsequent change of status, and that this principle justifies the trial and sentence of a person out of the service where jurisdiction has attached while he was in the service. *Coleman v. Tennessee*, 97 U. S. 509; 16 Op. 349, 352; *Barrett v. Hopkins*, 7 Fed. 312; *In re Walker*, *supra*; *In re Bird*, *supra*; *In re Dew*, 25 Law Reporter, 538, 540; *United States v. Reaves*, 126 Fed. 127, 131; Winthrop, *Military Law*, p. 120; Dudley, *Military Law*, p. 34; Davis, *Military Law* (1913 ed.), p. 59.

This well-settled rule may be claimed to require the assertion of the same jurisdiction whether prosecution has

been instituted before the defendant left the service or not. To this claim, however, there are two answers. First, the undoubted grant of jurisdiction to institute proceedings against a person in the service necessarily implies a grant of jurisdiction to carry the proceedings through to their legitimate end; second, by the institution of the proceedings the defendant acquires a new status; viz, that of a person under military charges, and this status he does not lose by the loss of his military status generally. *Carter v. McClaughry, ubi supra.*

In view of the specific provision in paragraph 11 of article 14, of the uniform ruling of the Army and Navy authorities, and of the rulings of my predecessors, I feel that my duty does not permit me to state my opinion otherwise than that a person discharged from the naval service before proceedings are instituted against him for violations of the Articles Governing the Navy, excepting article 14, can not thereafter be brought to trial before a court-martial for such violations, though committed while he was in the service. In view, however, of the unsatisfactory state of the authorities and of the grave objections on principle to this conclusion, I see no reason why you should not assert the jurisdiction in a proper case in order to obtain, if possible, an authoritative judicial determination of the question.

I have not considered what constitutes a beginning of proceedings against a person in the naval service for violation of the articles, nor whether such proceedings were in fact begun in the case stated in the memorandum of the Judge Advocate General, because my opinion is not asked upon the point, nor are the papers sufficient to raise it satisfactorily.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE NAVY.

113598°—19—VOL 31.—34

AGREEMENT RELATING TO RADIO APPARATUS.

The Vreeland Apparatus Co., by its agreement dated July 1, 1916, with the Atlantic Communication Co., conveyed to the latter company such right, title, or interest in the radio apparatus covered by the patents to which the agreement relates as precludes it from delivering to the Government a license to make, use, and sell, or to have made for its use, said apparatus.

DEPARTMENT OF JUSTICE,

July 14, 1919.

SIR: In response to your request of April 1, 1919, for my opinion upon an agreement dated July 1, 1916, between the Vreeland Apparatus Co. and the Atlantic Communication Co. relating to certain patented and patent-pending inventions in wireless or radio communication, I have the honor to transmit the following:

I have carefully considered the agreement in question, and my answer to the question stated in paragraph 3 of your letter is that the Vreeland Apparatus Co. by this instrument did convey such right, title, or interest to the Atlantic Communication Co. as precludes it from delivering to the Government a license to make, use, and sell, and to have made for its use, radio apparatus covered by the patents to which the agreement relates.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF WAR.

CIVIL SERVICE—EMPLOYEES OF RAILROAD ADMINISTRATION.

Persons employed by the Director General of Railroads in connection with the Federal control of railroads need not be appointed in accordance with the Civil Service Act and rules.

DEPARTMENT OF JUSTICE,

July 16, 1919.

SIR: You have recently referred to me a letter from the Civil Service Commission asking my opinion whether persons employed by the Director General of Railroads shall be appointed in accordance with the Civil Service Act and

rules. It appears from the letter of the Civil Service Commission to me of June 13, 1919, that this question refers to the employees of the Director General whose employment is due to the Federal control of railroads.

The Act of August 29, 1916 (39 Stat. 645), provides:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

The President exercised the authority thus conferred upon him by proclamation dated December 26, 1917. The proclamation recites that

"It has now become necessary in the national defense to take possession and assume control of certain systems of transportation * * * for the transportation of troops, war material and equipment therefor, and for other needful and desirable purposes connected with the prosecution of the war." (40 Stat. 1734.)

The proclamation further appoints a Director General for the purpose of undertaking Federal possession and control.

The Act of March 21, 1918 (40 Stat. 451), passed nearly four months after Federal control had been assumed, deals primarily with the manner in which the carriers shall be compensated. The Act also regulates some of the incidents growing out of Federal control and, in section 9, states that the provisions of the Act of August 29, 1916, "shall remain in force and effect except as expressly modified and restricted by this Act." Section 12 of the Act provides for payment of expenses of operation out of receipts from operation "in the same manner and form as before Federal control" and for the payment of any deficit thereby arising out of the revolving fund created by section 6. There are no other provisions bearing upon employment during Federal control, so that such employment is left to be governed by the terms of the earlier statute and proclamation.

It has been held by my predecessors that Congress, in enacting legislation, may, by implication and without any express words to that effect, exempt positions in the Government service from civil service requirements (25 Op. 413; 22 Op. 556). The Act of August 29, 1916, and the ensuing proclamation of November 26, 1917, are in terms directed to meet a war emergency. It is part of the history of the times that the Government acted in order to eliminate delay in transportation. It is also universally recognized that delay results from the application of civil service requirements. The necessities of the situation out of which arose Federal control of the railroads therefore raise a clear implication that Congress did not intend employees engaged in the Federal operation of the railroads to be bound by the civil service rules.

Evidence much more slight than in the present case has been held to show an intention on the part of Congress to dispense with the civil service rules. The sundry civil act of July 1, 1898, contained an appropriation "for temporary typewriters and stenographers in the Department of State, to be selected by the Secretary, \$2,000, to be immediately available" (30 Stat. 645). Attorney General Griggs, in holding (22 Op. 556, 558) that the positions thus created were not within the civil service, said:

"The appropriation clause does not create offices or positions, but merely provides for temporary employment. In such cases it is quite reasonable to suppose that Congress intended that the Secretary should be unimpeded in his speedy selection of his force by any of the ordinary delays which occur in complying with the civil service rules where positions in the classified service are to be filled upon certification of names from the eligible list."

The Commission has asked me whether the Civil Service Act and rules apply to employees of the Railroad Administration whose employment is due to Federal control of the railroads, and the question is said not to refer to the operating employees of the roads. The suggested distinction between these two classes of employees is one not found in the measures dealing with Government operation of the railroads. It is also doubtful whether it could be

given practical effect. Difficult questions arising from the consolidation of service and functions on the one hand and from increase in duties and burdens because of Federal control on the other hand would be raised. I believe that the legislation of Congress and the action of the President treated the transportation systems as a unit. If this is so, all or none of those employed during Federal management are subject to civil service.

The wording of the proclamation taking over the railroads is inconsistent with the application of civil-service rules to all those employed during Federal possession. The proclamation states that, except as the Director General otherwise directs, the duties imposed through Federal operation are to be performed "through the boards of directors, receivers, officers and employees of said systems of transportation" and that operations are to continue "in the usual and ordinary course of the business of the common carriers, in the names of their respective companies." In other words, the employees of the carriers, who have not been appointed according to civil service rules, are to be continued in employment until the Director General rules otherwise. In addition, operations are to be continued according to the established course of business of the carriers, which would not be the case if a vital change were to be made in the method of engaging employees. The power of the President to exercise control of the railroads through any agency whatsoever was confirmed by section 8 of the Act of March 21, 1918.

Rule 2, section 1, of the civil-service rules provides:

"The classified service shall include all officers and employees in the executive civil service of the United States, heretofore or hereafter appointed or employed, in positions now existing or hereafter to be created * * *."

In *Twenty Per Cent Cases*, 18 Wall. 568; 20 Wall. 179, it was held that a person need not be designated in an appropriation act to come within the terms of a joint resolution of Congress applying to persons "now employed in the civil service of the United States." Authorized employment by a Department head was held to satisfy the resolution. The civil-service rule applies, however, to em-

ployment in a position "now existing or hereafter to be created." It seems reasonable to suppose that the Commission's rule was intended to apply to positions created by Act of Congress and not to positions where an administrative officer's given authority to designate both the character of the duties to be performed and the amount of compensation to be received.

I have set forth at some length the reasons that lead me to conclude that persons employed by the Director General of Railroads in connection with the Federal control of railroads need not be appointed in accordance with the Civil-Service Act and rules.

Respectfully,

A. MITCHELL PALMER

TO THE PRESIDENT.

WAR RISK INSURANCE—TOTAL DISABILITY OCCURRING
BEFORE APPLICATION THEREFOR.

Under a provision of the War Risk Insurance Act of October 6, 1917 (40 Stat. 409), an enlisted man, who was in the active service at the time of the publication of the terms and conditions of the contract of insurance covering total permanent disability, and who sustained such disability before the expiration of 120 days from such publication, without having applied for such insurance, is entitled to be treated as having been automatically insured and to receive \$25 per month.

The Bureau of War Risk Insurance is unauthorized to grant insurance against total permanent disability upon an application made therefor after such disability has been sustained, and hence any premiums paid upon insurance thus applied for should be returned to the applicant.

DEPARTMENT OF JUSTICE,

July 18, 1919.

SIR: I have the honor to acknowledge receipt of your letter of June 30, 1919, requesting an opinion as to the right of Private McLeod to insurance under the War Risk Insurance Act upon facts stated as follows:

"The above-named man entered the service June 13, 1917. On September 4, 1917, he lost both legs by the explosion of a bomb during a German air raid. On Febru-

ary 2, 1918, he applied for war risk insurance of \$10,000, payable in two hundred and forty monthly installments of \$57.50 each to himself during total permanent disability and from and after his death to his mother. He has been awarded compensation of \$100 monthly under section 302 (h) of the War Risk Insurance Act (40 Stat. 612). Now, on account of total and permanent disability caused by the loss of both legs as aforesaid, he claims payment of the insurance applied for by his application of February 2, 1918."

McLeod is within the class as to whom section 400 of the War Risk Insurance Act (40 Stat. 409) provides—

"the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability"—

upon the payment of premiums.

An applicant, being within the class of persons named, is entitled to the insurance as a matter of right upon making application therefor within the time allowed by section 401 (40 Stat. 409) as follows:

"That such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation, except that those persons who are in the active war service at the time of the publication of the terms and conditions of such contract of insurance may apply at any time within one hundred and twenty days thereafter and while in such service." * * *

It is not stated, but I assume that McLeod had not been discharged when he applied for insurance. The terms and conditions of the contract of insurance to be granted, I am informed, were published on October 15, 1917. McLeod had previously entered the service, and his application on February 2, 1918, was within 120 days after that date. But his total disability occurred before and was existing both on October 15, 1917, and on February 2, 1918.

In cases which have heretofore arisen in the courts, I have advised the bureau that the insurance is collectible if applied for within the time allowed and before either total permanent disability or death has actually occurred, and

hence is not defeated by the fact that the applicant was mortally ill. However, what is provided for is a contract of insurance against something that may happen and not of indemnity for something which has already happened. If no application has been made when death occurs, of course there is no insurance; and if total permanent disability has been incurred, a future application for insurance can not cover it. And Congress evidently had this in mind. There were men in the service when the terms and conditions of the contract were published. Some of them had already been killed or disabled. Others would doubtless be killed or disabled before the nature of the contract could be generally known and applications taken. These disabilities would not be covered by insurance thereafter applied for; and one who was already dead could not of course make an application. To take care of this class, special provision was made as follows:

“Any person in the active service on or after the sixth day of April, nineteen hundred and seventeen, who, while in such service and before the expiration of one hundred and twenty days from and after such publication, becomes or has become totally and permanently disabled or dies, or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of \$25 each.” (40 Stat. 409.)

It is then provided that if the insured dies before receiving 240 monthly payments, such amounts shall be payable monthly to his dependents until 240 payments, including those made to the insured, shall have been made.

McLeod is within this class and is entitled to be treated as having been automatically insured and to receive \$25 per month; but this, I think, is the full extent of his right to insurance.

Where the insurance is granted upon an application, the applicant elects how much insurance he will take between the limits of \$1,000 and \$10,000, and pays premiums accordingly. In the case of those automatically insured so as to cover disabilities incurred before the making of an application no premiums are paid, and Congress has designated

the amount of the insurance, selecting an amount which approaches an average between \$1,000 and \$10,000. In other words, persons in this class are of necessity excluded from those who have applied for insurance against disabilities that may thereafter occur, and must look to the special provision made for them by way of automatic insurance mentioned above.

I am clearly of the opinion that McLeod is entitled only to the \$25 per month, and I agree with counsel of the bureau that any premiums which he may have paid should be returned to him.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.

CONTRACTS FOR ORDNANCE MATERIAL.

A provision in a contract for furnishing ordnance material, which authorizes an allowance of plus or minus 5 per cent of the articles ordered, does not foreclose the Government from insisting upon delivery of the full amount specified by the contract, nor does it enable the contractor to force acceptance of a greater amount.

Where the contract contains no such plus or minus clause, the Government can not be compelled to accept a greater quantity, but if it accepts and uses a greater quantity it should be required to pay for the same.

The contract under consideration authorizes an allowance for overproduction and provides that disputes arising as to the meaning of anything in said contract shall be referred to Chief of Ordnance for determination; but claims arising under contracts which contain no authority for allowance for overproduction, and which therefore can not be allowed under such contracts, must be dealt with under the Act of March 2, 1919, providing relief in cases of contracts connected with the prosecution of the war.

DEPARTMENT OF JUSTICE,

July 23, 1919.

SIR: In your letter, received on the 7th instant, you state that there are a great many contracts for ordnance material containing the following provision:

"This contract may be completed and so certified by the Chief of Ordnance by delivery and acceptance by the

United States of the articles herein ordered, plus or minus 5 per cent thereof."

You say also that "There are several contracts in which no such provision is made," and request a formal opinion for the guidance of the War Department upon three questions:

"First. As to whether the Government is compelled to accept less than the full amount contracted for as a complete fulfillment of the contract, or if the contractor could force the Government to accept an overproduction in those contracts containing a plus or minus clause.

"Second. Can the Government allow the contractor an overrun as a tolerance on those contracts which contain no plus or minus clause?

"Third. Who is the authority to determine these questions, or does the contract control of its own force?"

You inclose with your inquiry a form of contract which I presume is the form used in all contracts with reference to which your inquiry is made, the only difference being that some of the contracts include Article XIII, while from others it is omitted. Article XIII reads:

"ARTICLE XIII. This contract may be completed and so certified by the Chief of Ordnance by the delivery to and acceptance by the United States of the articles herein ordered, plus or minus, five (5) per cent thereof."

Answering your questions in order:

I. The "plus or minus" provision in Article XIII was evidently inserted to eliminate uncertainty as to the right to allow for deviation from the quantity of articles specified to be furnished by the contract; and it definitely authorizes allowance for excess or deficiency within the limit named, that is, 5 per cent of the articles ordered. The provision is not mandatory but is enabling and should be read in connection with provisions of the contract as to payment upon certificate of the Chief of Ordnance that the performance of the contract has been completed. It does not foreclose the Government from insisting upon delivery of the full amount specified by the contract, nor does it enable the contractor to force acceptance of a greater amount; it simply provides a margin within the limits of

which excess or deficiency in the amount of articles called for by the contract may be properly allowed.

II. The fact that Article XIII is included in some contracts and excluded from others, both classes of contracts being made by the War Department, raises the presumption that this was purposely done and no authority to accept and pay for overproduction was intended, and that overproduction could not be required. The answer to your question can not be that no such allowance can be made, for each contract must be determined according to its terms and the facts and circumstances peculiarly incident to it; and it can not be said that under no circumstances could an allowance be made for overproduction, for if the overproduction was accepted and used by the Government, then its obligation to pay for the same, if not deducible from the contract, might be implied. *Clark v. United States* (95 U. S. 539), *Reeside v. United States* (2 C. Cls. 1). The inclusion of the "plus or minus" provision in some contracts was, as stated above, to definitely fix the allowable variations from the contractual specifications as to quantity and eliminate controversies that might arise by the use of the words "more or less," or similar words when variation from specified quantity was probable. The omission of any such qualifying words makes the specification as to quantity rigid, that amount can be demanded and must be accepted. The Government can not be compelled to accept a greater quantity, but if it accepts and uses a greater quantity, it should certainly be required to pay for the same.

III. As to who is the proper authority to determine these questions, Article X of the contract stipulates:

"ARTICLE X. Except as this contract shall otherwise provide, any doubts or disputes which may arise, as to the meaning of anything in this contract shall be referred to the Chief of Ordnance for determination. If, however, the contractor shall feel aggrieved at any decision of the Chief of Ordnance upon such reference it shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding on both parties hereto."

No other provision is made in the contract for the determination of disputes that may arise as to the meaning of Article XIII, therefore Article X, above quoted, applies.

The act of March 2, 1919 (40 Stat. 1272), entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," provides in part:

"That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition, or control of equipment, materials, or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or in expenditures, have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law: *Provided*, That in no case shall any award, either by the Secretary of War or the Court of Claims, include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order: *Provided further*, That this Act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen."

Claims arising under contracts which contain no authority for allowance for overproduction, and which therefore

can not be allowed under such contracts, must be dealt with under this Act.

Very truly, yours,

A. MITCHELL PALMER.

To the SECRETARY OF WAR.

TARIFF COMMISSION—DISCLOSURE OF TRADE SECRETS.

The United States Tariff Commission is not prohibited from placing in the hands of the War Trade Board for appropriate use trade secrets which have come into the possession of the Commission in the course of the exercise of its official functions.

The Tariff Commission should furnish such information to the War Trade Board only after due consideration of the use designed to be made of it, and if, as a result of its inquiry, the Commission has any doubt as to whether the proposed use of such information would be inimical to the purpose of the statutory inhibition against divulging trade secrets, it would be entirely within the scope of its sound discretion to decline to disclose it.

DEPARTMENT OF JUSTICE,

July 28, 1919.

SIR: I have the honor to acknowledge your request of July 17, 1919, for an opinion upon the question embodied in a letter addressed to you by the United States Tariff Commission, viz: Whether the Tariff Commission is authorized to place in the hands of the War Trade Board, at the solicitation of the Department of State, of which by virtue of an Executive order of May 12, 1919, said Board is an adjunct, trade secrets which have come into the possession of the Tariff Commission in the course of the exercise of its official functions. The War Trade Board submits the inquiry because of a doubt which it entertains with respect to the effect of the provision contained in section 708 of the Act approved September 8, 1916 (39 Stat. 795, 798), creating the United States Tariff Commission, whereby it is made unlawful for any member of the commission, or any employee, agent, or clerk thereof, to divulge trade secrets. Section 708 is:

“It shall be unlawful for any member of the United States Tariff Commission, or for any employee, agent, or clerk of said commission, or any other officer or employee of the United States, to divulge, or to make known in

any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, co-partnership, corporation, or association embraced in any examination or investigation conducted by said commission, or by order of said commission, or by order of any member thereof. Any offense against the provisions of this section shall be a misdemeanor and be punished by a fine not exceeding \$1,000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employment. The commission shall have power to investigate the Paris Economy Pact and similar organizations and arrangements in Europe."

It will be noted that the inhibition in the foregoing section is directed against the disclosure of trade secrets "to any person." It is a well-recognized rule of law that the sovereign power is not included by the general terms of a statute. *Title Guaranty Co. v. Guarantee Title & Trust Co.*, 174 Fed. (C. C. A.) 385. By the terms of section 703 of the above-mentioned Act the United States Tariff Commission is required upon request to place "all information at its command" at the disposal of the President, the Committee on Ways and Means of the House of Representatives, and the Committee on Finance of the Senate, and by section 707 of the Act it is provided:

"That the said commission shall in appropriate matters act in conjunction and cooperation with the Treasury Department, the Department of Commerce, the Federal Trade Commission, or any other departments, or independent establishments of the Government, and such departments and independent establishments of the Government shall cooperate fully with the commission for the purposes of aiding and assisting in its work, and, when directed by the President, shall furnish to the commission, on its request, all records, papers, and information in their possession relating to any of the subjects of investigation by said commission and shall detail, from time to time, such officials and employees to said commission as he may direct."

The inhibition in section 708 applies not only to the members of the Tariff Commission and others connected

therewith, but as well to "any other officer or employee of the United States." The War Trade Board was created and its duties prescribed by an Executive order of October 12, 1917, and it is, therefore, assumed that it is embraced in the designation "independent establishments of the Government" between which and the Tariff Commission there shall be cooperation as contemplated by section 707.

These considerations, it seems to me, are persuasive of an interpretation of section 708, which, in pursuance of the cooperation authorized by section 707, would not preclude the availability of all the information gathered by the Tariff Commission for any appropriate use by any Department or independent branch of the Government, including the War Trade Board. Obviously, under the terms of section 708, any member of that board or any of its employees, agents, or clerks who might unlawfully divulge trade secrets which had been communicated to that Board by the Tariff Commission would be subject to the penalty prescribed by that section to the same extent as those who comprise or are employed by the Tariff Commission.

It is deemed only proper to add, however, that section 708 is a penal statute, for which reason it would be inexpedient for the Attorney General to undertake to say in advance what the courts might eventually hold as to whether or not in a given case there had been a violation of that section. The question as to the propriety of placing in the hands of the War Trade Board the information which has been requested is one which, in the first instance, should, it is believed, be determined by the Tariff Commission itself, after due consideration of the use designed to be made thereof. If, as a result of its inquiry, the Commission has any doubt as to whether the proposed use would be inimical to the purpose which the inhibition in section 708 was intended to serve, it would, in my judgment, be entirely within the scope of its sound discretion for the Commission to decline to disclose the data asked for.

Respectfully,

A. MITCHELL PALMER.

TO THE PRESIDENT.

**SALE OF LAND UNDERLYING GOVERNMENT WHARF AND
WAREHOUSE AT SITKA, ALASKA.**

The Secretary of the Treasury is authorized to dispose of the land above high-water mark underlying the Government wharf and warehouse at Sitka, Alaska.

The wharf may be conveyed with the right to maintain it as located subject to the laws enacted in the interests of commerce, navigation, and fishery with respect to the land lying below high-water mark.

DEPARTMENT OF JUSTICE,

August 9, 1919.

SIR: I have the honor to respond to your letter of June 25, 1919, requesting my opinion as to whether the Act of August 1, 1914 (38 Stat. 609, 615), confers authority to sell the land upon which the Government wharf and warehouse at Sitka, Alaska, are situated.

The provision in question is contained in a general item of appropriation for "repairs and preservation" which, after referring specifically to the "buildings and wharf at Sitka, Alaska," reads as follows:

"The Secretary of the Treasury may, in renting said wharf, require that the lessee shall make all necessary repairs thereto, and the Secretary of the Treasury is hereby authorized, in his discretion, to dispose of said wharf and warehouse upon such terms and conditions as may be for the best interests of the United States."

This provision is broad enough to authorize a conveyance of the land upon which the structures stand, and the intention to grant such authority would result naturally from the fact that the structures have little or no substantial value without the land. But other considerations require certain limitations of the general language.

This wharf and warehouse were included in the purchase of Alaska from Russia. By Executive order of June 21, 1890, the property was reserved "for the legitimate uses and purposes of the public." It was then and has been ever since in the custody of the Treasury Department and used as a public wharf or leased for such use under congressional authority. In view of such constant use for a specific purpose under an express reservation, a disposal

of the property under the general authority conferred should be conditioned upon its continued use for that purpose.

A portion of the land in question lies below the ordinary flow of the tide. The policy to reserve such land to be used and dealt with as a whole in the interests of commerce, navigation, and fishery has been long established and jealously guarded. Even the power of Congress to dispose of land under tide water was once a matter of serious doubt, and, while that power was finally conceded, it was established at the same time that its effective exercise must be plainly expressed. *Shively v. Bowlby* (152 U. S. 1, 48; *United States v. Winans*, 198 U. S. 371, 383). I therefore conclude that the implied authority to dispose of the land underlying the wharf and warehouse does not extend to land below the ordinary high-water mark.

This conclusion does not render ineffectual a conveyance of the wharf. It may be conveyed with the right to maintain it as located subject to the laws enacted in the interests of commerce, navigation, and fishery with respect to the land lying below high-water mark.

Very respectfully,

A. MITCHELL PALMER.

TO THE SECRETARY OF THE TREASURY.

POTASH MINED IN GERMANY—ANTITRUST LAWS—DISCRIMINATORY EXPORT DUTY.

Where the owners of potash mines in Germany entered into an agreement, the effect of which is to place all the potash mines in Germany, with one exception, under the control of a syndicate which fixes the selling price of potash for every mine, and the syndicate established connections with an American corporation for the sale of its potash shipped into the United States, such facts are subject to the provisions of the Act of August 27, 1894 (28 Stat. 570), prohibiting combinations in restraint of import trade; and such facts also establish a violation of the provisions of the Sherman Antitrust Act of July 2, 1890 (26 Stat. 209), as constituting a "contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * * with foreign nations."

NOTE.—This opinion was temporarily withheld from publication and later released.

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Whether the tax imposed by the German potassium salts law of May 10, 1910 upon potash shipped into this country is a discriminatory export duty within the meaning of section 2 of the Tariff Act of August 5, 1909 (36 Stat. 82), is a question of fact that must be determined by the President; and, in determining whether such tax is discriminatory, the President should consider all the attendant facts and circumstances.

DEPARTMENT OF JUSTICE,

October 5, 1910.

SIR: I have the honor to acknowledge receipt of your communication of August 30, 1910, in which you ask my opinion with reference to certain questions of law which arise from a contract made between various persons and corporations engaged in mining potash in Germany, and certain commercial conditions which are affected by this contract. The facts which appear in your communication and in the documents which accompany the same, and which you have presented to me, are as follows:

There is but little potash found elsewhere than in Germany, in which country there are 68 potash mines now in operation, and these mines are owned in the main by German corporations. This salt is used very extensively by manufacturers of fertilizers, and necessarily the American manufacturers of this product have for many years purchased their supplies from the German mines. Without entering into a history of the conditions of the trade previous to July 1, 1909, it is sufficient to say that with the 30th day of June, 1909, the contract which had previously existed between the owners of these mines, and under which they were organized into a syndicate, terminated, and on the 1st day of July, the American consumers entered into a contract with a number of the owners of these mines, whereby they contracted for their supply of potash at a very much reduced price. Previous to this date, an investigation of the production of potash had been made, and it had been ascertained that the American purchasers had been paying nearly four times the cost of production, and while under the new contracts entered into, the price was fixed at little more than half what had been formerly paid, yet the mine owners would realize thereunder a profit of about 100 per cent upon their sales.

As the United States is one of the greatest consumers of potash, an effort was at once set on foot by various mine owners, to devise some scheme to avoid these contracts, and to force a distribution of the American demand among other owners, and also apparently to compel the American purchasers to pay something like the prices which had been previously paid by them.

Your communication states that a bill was introduced in the German Reichstag on December 17, 1909, the object of which was to place all the potash mines of Germany under the control of a syndicate, so as to prevent the sale of potash by some mines at prices less than were acceptable to other mines; that this bill was withdrawn in January, 1910, but a proposal was then made to levy an export tax equal to \$20 per ton of muriate of potash, the effect of which would have been to render valueless the contracts with the American purchasers above referred to, since the proposed export duty would have substantially equaled the delivered price at ports of the United States of the potash under contract. Against this proposal the United States filed its protest with the German Government. At that time negotiations were in progress between the two Governments for the purpose of arranging a commercial agreement under section 2 of the tariff law of August 5, 1909 (36 Stat. 82), by which it was hoped the minimum tariff of Germany could be obtained, as applying to exports from the United States, in exchange for the granting of the minimum rates of the tariff of the United States upon importation from Germany. You further advise me that the withdrawal of the proposed potash measure from the German Reichstag was accepted by you as evidence of a willingness, on the part of the German Government, to abandon legislation which would be restrictive of commerce and impose undue burdens upon importations from Germany. Soon after the conclusion of the arrangement by which the minimum tariffs of the two countries were granted each to the other, it appears that a new project of law was introduced in the Reichstag which, under another form, by tax upon mining in excess of specific allotments, would operate to tax the American contracts even

more severely than was proposed in the abandoned measure. The American embassy was again instructed to use its good offices with the German Government for such modification of the proposed law as would recognize the sanctity of the contracts previously entered into between German citizens and citizens of the United States, to the end that these contracts might not be impaired or affected. Assurances were given by the German foreign office, as reported by the American embassy upon the enactment of the measure into law, that the American contracts would not be invalidated nor impaired, and that the power to fix prices in the law, as modified, clothed the Bundesrat with authority so that the contracts would not be affected. The law passed on May 10, 1910, took effect as of May 1, 1910. The most salient features of the law are as follows:

Owners of potassium salts mines shall sell potassium only in conformity with the provisions of the Act. The term sales applies to shipments to foreign countries. Sales to foreign countries can be made only by owners of potassium salts mines. The total amount to be sold by the owners of mines during a calendar year is to be fixed by the board of apportionment, which is a body created by the Act; said board is to determine what part of the total amount to be sold is to be allotted for domestic consumption, and what part is to be sold abroad, which quantities may be subsequently increased, and shall determine the share that is to be allotted to each mine owner; the mine owners shall participate in the domestic and foreign sales in the proportion of their percentage of participation; and the share in the foreign sales to which any owner is entitled shall be reduced in the same rate in which the domestic sale of such owner remains below his percentage of participation during the year. The mine owners have the right to transfer their right in the total shares to which they are entitled either in whole or in part, and to exchange among themselves the privilege of selling certain kinds of salts. The selling price charged by owners of potassium salts to domestic buyers for supplies of potassium salts shall not exceed the prices fixed in the twentieth article of the Act until December 31, 1913, and thereafter the

Bundesrat shall determine the maximum prices at the end of each term of five years, but the Bundesrat may determine that purchasers of considerable quantities shall be given a discount, and that discount may be given for cash; and the prices charged for the sale and delivery of salts to foreign markets shall not be lower than the prices for salts in Germany; but these provisions with reference to the prices of salts do not apply to contracts made before April 17, 1910. In case the owner of a potassium salt mine exceeds the amount of potassium salts he is entitled to sell, under the distribution made by the board of apportionment, such owner shall pay into the treasury of the Empire, a tax on the amount of salts sold in excess, at the rate fixed by article 26: For illustration, a double hundred weight (220.46 pounds) of salts containing 20 to 22 per cent potassium protoxide, would be taxed 13 marks, or about \$3.09. These taxes are collected by the proper authorities of the country in which the mines are located in accordance with the provisions for collecting public taxes in force at the time; and whoever fails to pay to the Empire these taxes is guilty of tax fraud and is punishable by a fine amounting to four times the amount of taxes, and in cases where it is impossible to determine the amount of taxes a fine not exceeding 500,000 marks shall be imposed. A failure to comply with the provisions of the Act and the administrative regulations promulgated to carry the same into effect is punishable by a fine not to exceed 10,000 marks. The Bundesrat is empowered to reduce the taxes on goods supplied on contracts made before December 17, 1909, to such an extent that the prices of deliveries after May 1, 1910, including the taxes, will not be higher than the prices which were in force until June 30, 1909.

Nearly contemporaneous with the passage of this Act, a number of mine owners entered into an agreement to which all but one of the owners have subsequently become parties. The provisions of this agreement which bear directly upon the matter now under consideration are as follows:

It is declared that it was entered into "for the purpose of preventing, from this time forth, unhealthy competition

in the potassium salts market," and each of the members agrees to refrain from selling his products for his own account, or even from offering them for sale, and the members agree to entrust the syndicate exclusively with the task of disposing of their products, and to refer to the same all orders for the delivery of goods, and all inquiries that they may receive; and a failure to comply with the agreement subjects the offender to a penalty amounting to 10 times the value of the goods sold or offered for sale. The syndicate shall assign all orders to the members, and shall remit the members the part of the selling price to which they are entitled. Any member transferring to another party working rights or other privileges, shall assume the responsibility that his assignee will become his substitute in the fulfillment of the provisions of the agreement, and any member failing to place his vendee or alienee under obligation to assume the contract shall pay a fine of 300,000 marks. No works owned by a member shall use in its manufacturing processes crude salts of any description which are the products of salt works not subject to the provisions of the agreement, and no works owned by a member shall be transferred to third parties for the purpose of converting crude salts into manufactured products, unless a special agreement has been made with the syndicate. The percentage of participation in the sales of salts allotted to the members shall be the percentages of participation which agree at the time with the provisions of the potassium salts law; and the share of each member in the filling of orders is to be, as far as possible, proportionate to the percentage of participation in the sales allotted such member for his quarterly term in which such orders are filled; and in distributing the orders, the board of managers shall consider as far as possible the situation of the mines with respect to freight charges; but in exceptional cases and in order to place the syndicate in a better position to compete, the board shall have the right to temporarily allot to any mine, with the consent of the board of directors, larger deliveries than may be allotted the same in view of its percentage of participation in the sales, if such mine offers to fill the order at the cheapest price, and is most favorably located

with respect to freight charges. Whoever acts contrary to the provisions of the agreement shall pay to the syndicate a fine not exceeding 500 marks for each act except where special fines have been provided for stated cases; and any member who, either himself, acts contrary to any one of the provisions, or whose works act contrary to the same, shall incur a fine of 20 marks for each 100 kilograms of potassium protoxide worked up, delivered, or purchased, unless larger fines for nonperformance are especially provided.

The agreement is a lengthy one, and is worked out in elaborate detail, but the foregoing is deemed sufficient to indicate its nature.

When the German law and the above agreement became effective, the price paid by the American purchasers immediately became about twice the amount specified in their contracts with the mine owners. For example, the American companies had contracted with a mine called Sollstedt to furnish potassium salts at about \$21 per ton, but in their contract, it was provided that any export or import duties or other governmental charges, which might become effective within the life of the contract, should be paid by the buyer. The allotment to this mine was about 30,000 tons per annum, only one-half of which, under the provisions of the Act, could be sold abroad, but the mine had sold about 110,000 tons in America, and none in Germany; and under that peculiar provision in the law which reduces the foreign sales which an owner is entitled to make in the same ratio in which his domestic sales remain below his per cent of participation, the entire output of this mine was excessive production, and was therefore subject to the tax, and the tax being about the same as the selling price, made the total cost about \$42 per ton. This additional sum has been paid by the purchasers under protest.

For the sale of its products in the United States this syndicate has established connections with a corporation, known as the German Kali Works, which is organized under the laws of New York and has offices in New York City.

This entire matter having been called to the attention of the Department of State, and negotiations with the

German Government in regard to the matter being under way, you ask my opinion as to whether or not, sections 73 and 74 of the Act of August 27, 1894 (ch. 349, 28 Stat. 570), and section 2 of the Tariff Act of August 5, 1909 (36 Stat. 82), or either of them is applicable to the facts detailed.

Section 73 of the Act of August 27, 1894, is as follows:

"That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal and void, when the same is made by or between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and, on conviction thereof in any court of the United States, such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months."

The seventy-fourth section provides that the several circuit courts of the United States are invested with jurisdiction to prevent and restrain violations of section 73; and it is made the duty of the district attorneys to institute proceedings in equity to prevent and restrain such violations, which proceedings may be by way of petitions setting forth the facts, and praying that such violations shall be enjoined or otherwise prohibited.

It is unnecessary to say that a law enacted by the German Government can not, in itself, constitute a combina-

tion within the meaning of this Act. Whatever the conditions may have been that prompted its passage, or the influences that conspired to bring it about, yet upon the passage of the law it became an act of the German Government and can not in any sense be considered a combination. But the statute of the German Empire can not protect citizens of that country still less American citizens from the consequences of acts done within the jurisdiction of the United States in violation of *its* laws. The agreement or contract entered into in Germany between the various potash owners, so far as its provisions are the same as the provisions of the German law, does not of itself constitute an unlawful combination within the provisions of our law. But any acts done within our jurisdiction must be judged by our law. For illustration: The law provides that the board of apportionment shall fix the maximum price for potash in the home market, which shall constitute the minimum price in the foreign market (this provision, however, does not apply to the American contracts, as they were made before Apr. 17, 1910), and further provides for a prorata distribution among the mine owners to be made by this board. Any agreement, therefore, between the mine owners, which would go no further than these requirements, would be valid in Germany, but any acts done pursuant to such an agreement within the United States which would result in a restraint of trade or free competition between the United States and Germany would be subject to the laws of this country. In the present instance, however, the owners of potash mines in Germany have not been content to rest alone on the above-mentioned Act.

The contract under which the syndicate in question was organized, goes much further than the provisions of the German Act. Its purpose is declared to be to prevent "unhealthy competition"; and the effect of it is to place all the potash mines in Germany, with one exception, under the control of one body, which body fixes the selling price of potash for every mine. Under the Act, while no one could sell in a foreign market potash at a price below that fixed by the board of apportionment, yet free competition was

allowed beyond that price, while such competition is entirely destroyed in the agreement in question. This fact alone, without going into the details of the agreement, is sufficient to show beyond question that the combination is not protected by the German Act and is such as the Act of Congress condemns, and the only question is whether or not the combination or agreement is made by or between persons or corporations, either of whom is engaged in importing potash into the United States. It is an unquestioned fact that a very large quantity of potash is imported into the United States; but are these importations made by persons or parties, any one of whom has entered into this or another unlawful combination? The facts submitted to me do not clearly show the relationship between the American corporation, known as the German Kali Works, and the foreign syndicate created by this agreement, but they do show that one of two relationships must exist. Either the American corporation is a selling agent of the syndicate, which is composed of the mine owners, and the potash when shipped is consigned to it as such agent, or this corporation is a purchaser of the goods from the syndicate, and as such purchaser has agreed to handle the entire supply from the mines which are embraced in the syndicate at the prices fixed by this combination, and in accordance with its provisions, and has thereby either become a party to the agreement or has entered into an independent agreement of the same character. In either event, I think the statute would apply, because, in the first instance, the importer would be the German syndicate, or rather the various mine owners who under the combination have made the syndicate their agent, and, in the second instance, the American corporation would be the importer, which by its contract has become a party to this or another unlawful combination. A thorough investigation of the subject by a grand jury will disclose just what arrangements have been made to carry out what appears to be a plain combination in restraint of trade within the meaning of the Act of Congress. If the facts be found to be as stated, I am inclined to the opinion that they would also establish a violation of the provisions of the Sherman antitrust law

of July 2, 1890, as constituting a "contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * * with foreign nations." (26 Stat. 209.)

You further ask my opinion as to whether the second section, known as the maximum and minimum clause, of the Tariff Act of 1909, applies to the facts here presented. By that section the rates which are declared in the 718 paragraphs of the first section, together with the 25 per cent ad valorem, constitute the maximum tariff rate on imports, but it is provided:

"That whenever after the thirty-first day of March, nineteen hundred and ten, and so long thereafter as the President shall be satisfied, in view of the character of the concessions granted by the minimum tariff of the United States, that the Government of any foreign country * * * pays no export bounty or imposes no export duty or prohibition upon the exportation of any article to the United States which unduly discriminates against the United States or the products thereof, * * * thereupon and thereafter, upon proclamation to this effect by the President of the United States, all articles when imported into the United States, or any of its possessions (except the Philippine Islands, and the islands of Guam and Tutuila) from such foreign countries shall, except as otherwise herein provided, be admitted under the terms of the minimum tariff of the United States as prescribed by section 1 of this Act." (36 Stat. 82.) The question is whether under the German law the tax imposed upon potash shipped to this country is a discriminatory export duty within the meaning of the tariff law. As above shown, the tax is collected by the German Government and is paid into the treasury of the Empire, which Government makes an allowance for the expenses incurred in its collection.

In *Myers v. United States* (140 Fed. 648, 654) the question was whether a license fee imposed by the Province of Quebec for cutting wood on public lands, which was reduced when the wood was manufactured into pulp in Canada, was the imposition of an export duty on pulp wood

exported to the United States, within the meaning of the Tariff Act of July 24, 1897, imposing a countervailing duty on wood pulp equal to the amount of export duty imposed on pulp wood by the country of exportation; and it was held that it was, the court saying, "it is not called an export duty by that Dominion, but is imposed as a license fee. The merchandise can not escape our law, because we call it export duty and Quebec or Ontario calls it a license. The question is, What is it, in effect and in fact?" This decision was affirmed by the Circuit Court of Appeals for the Second Circuit, without an opinion, and was followed by the Circuit Court of Appeals, Seventh Circuit, in *Heckendorn v. United States*, in which a petition for writ of certiorari to the Supreme Court was dismissed. (214 U. S. 514.) The United States Supreme Court, in *Downs v. United States* (187 U. S. 496), held that when a tax was imposed by the Russian Government upon all sugar produced, but remitted upon all sugar exported, then by whatever process or in whatever manner or under whatever name it was disguised, it was a bounty upon exportation.

The German Act here under consideration expressly calls the amount to be paid by the mine owner who exceeds his apportionment of sales a tax, and it is a tax paid into the treasury of the Empire; and by virtue of this tax it appears that at the present rate of consumption there will be paid on exportation to the United States about \$4,500,000 per annum. It is not necessary here to decide whether a tax which is fairly imposed alike upon domestic and foreign sales can be considered as an export tax. Under the terms of the tariff act the authority of the President to act depends upon whether the tax "unduly discriminates against the United States"; and that is a question of fact that must be determined by the President. Clearly, however, in determining whether a tax is discriminatory, the President should consider not only the several intricate and subtle provisions of the Act, and their relationship to each other, but also their bearing upon the commercial conditions existing between the citizens of this country and the owners of potash mines in Germany, and ascertain

therefrom whether this provision of the German law must and does in fact work a discrimination against the United States. If it does, the revenue thus collected is a discriminatory export tax within the aforesaid provision of the tariff law.

It was manifestly the intention of Congress to obtain by virtue of this clause fair and impartial treatment in commerce at the hands of foreign Governments, and each case must be determined upon the conditions and facts actually existing, and no device or subterfuge should be permitted to defeat the legislative intent. The circumstances attendant upon the adoption of the law of May 10, 1910, by the German Government, may very properly be taken into consideration by the President in determining whether or not the tax was imposed with the specific intent of in effect nullifying the contracts for the sale of potash to American purchasers, and therefore clearly constitutes an undue discrimination against the United States.

Respectfully,

GEORGE W. WICKERSHAM.

To the SECRETARY OF STATE.

**RANK, TITLE AND COMPENSATION OF OFFICERS SERVING
AS CHIEFS OF CERTAIN BUREAUS OF NAVY DEPARTMENT.**

An officer of the line on the active list whose actual rank is that of a rear admiral of the upper nine, holding a commission as rear admiral, who is now serving as Chief of the Bureau of Ordnance under a commission as chief of said bureau for the term of four years with the rank of rear admiral and was so serving at the date of the approval of the Navy appropriation act of June 24, 1910, and who has had 30 years' service, remains a rear admiral of the upper nine, and a new commission should not be issued to him.

Where an officer of the line on the active list whose actual rank is that of a captain, holding a commission as such, is now serving as Chief of the Bureau of Navigation under the commission as chief of said bureau for a term of four years with the rank of rear admiral, and was so serving at the date of the approval of the Navy appropriation act of June 24, 1910, and has had 30

NOTE.—This opinion was temporarily withheld from publication and later released.

years' service: (a) such officer is entitled to a new commission as of the date of approval of said act; (b) the issuance of a new commission to such officer does not create a vacancy in the grade of captain in such sense as to authorize the promotion of an officer to fill such vacancy; (c) the commissioning of the Chief of the Bureau of Navigation as a rear admiral does not make him an additional number while on the active list in the already existing grade of rear admiral; (d) when regularly promoted in due course, the present Chief of the Bureau of Navigation (whose actual rank is that of captain) will be required to qualify for promotion to the grade of rear admiral under the provisions of sections 1493 and 1496 of the Revised Statutes.

An officer of the Pay Corps on the active list whose actual grade is that of pay director with the rank of captain, holding a commission as such, is now serving as the Chief of the Bureau of Supplies and Accounts with the title of Paymaster General under a commission as chief of said bureau for the term of four years with the rank of rear admiral, having been appointed to that office subsequent to the approval of the act of June 24, 1910, and who has had 30 years' service, should have the rank of rear admiral and is entitled to a new commission as of the date when, having 30 years' service, he thereafter began, in the language of the statute, to "serve as chief of bureau."

DEPARTMENT OF JUSTICE,

March 15, 1911.

SIR: I beg to respond to your request of January 19 for my opinion upon questions as to the rank, title, and compensation of officers serving as chiefs of certain bureaus in your department.

The business of the Navy Department is distributed among eight bureaus, including: "Third, a Bureau of Navigation; fourth, a Bureau of Ordnance * * * seventh, a Bureau of Supplies and Accounts." (Revised Statutes, sec. 419; act of July 19, 1892, 27 Stat. 243, 245.) The chiefs of these bureaus are "appointed by the President, by and with the advice and consent of the Senate," for terms of four years. (R. S. sec. 421.)

The provision of the Navy appropriation act approved June 24, 1910 (36 Stat. 605, 607), upon the application of which to the present chiefs of the bureaus above mentioned your questions mainly turn, reads as follows:

"The pay and allowance of chiefs of bureaus of the Navy Department shall be the highest shore-duty pay and

allowances of the rear-admiral of the lower nine; and all officers of the Navy who are now serving or shall hereafter serve as chief of bureau in the Navy Department and are eligible for retirement after thirty years' service, shall have, while on the active list, the rank, title, and emoluments of a chief of bureau, in the same manner as is already provided by statute law for such officers upon retirement by reason of age or length of service, and such officers, after thirty years' service, shall be entitled to and shall receive new commissions in accordance with the rank and title hereby conferred."

CHIEF OF THE BUREAU OF ORDNANCE.

As to the officer serving as chief of this bureau you state the following facts:

"An officer of the line on the active list whose actual rank is that of a rear admiral of the upper nine, holding a commission as rear admiral, is now serving as Chief of the Bureau of Ordnance under a commission as chief of said bureau for the term of four years with the rank of rear admiral and was so serving at the date of the approval of the act of 1910. He has had 30 years' service."

The following questions are submitted by you in this connection:

"(a) Does this officer continue to be a rear admiral of the upper nine, or does said Act reduce him to a rear admiral of the lower nine?

"(b) Should a new commission be issued to him and, if so, as of what date?"

Your letter contains also the following further explanation:

"In connection with the foregoing questions it may be explained that when an officer, as in this case, reaches the grade of rear admiral, i. e., is promoted thereto from the grade of captain, he receives a commission as rear admiral without any specification therein as to the lower nine or the upper nine; and when, in the course of advancement, an officer passes from the lower nine to the upper nine he does not receive a new commission but is simply advised

by letter that he has become a rear admiral of the upper nine. All rear admirals, whatever be their position in that grade, have the rank corresponding to that of a major-general in the Army. (Sec. 1466, R. S.)

"It may be noted that the officer concerned in the above questions already has a commission as a rear admiral, and if he were to be given a new commission it would be identical with the one he now has excepting in the matter of dates and signatures."

The Navy appropriation Act of May 13, 1908 (35 Stat. 127), establishing new rates of pay for officers in the Navy, provides that "the annual pay of each grade shall be as follows: * * * rear admiral, first nine, eight thousand dollars; rear admiral, second nine, or commodore, six thousand dollars."

The present chief of the Bureau of Ordnance being a rear admiral of the upper nine, your first inquiry raises the question whether, in view of the provisions of the Act of June 24, 1910 (36 Stat. 607), that "the pay and allowances of chiefs of bureaus of the Navy Department shall be the highest shore duty pay and allowances of the rear admiral of the lower nine," he continues to be a rear admiral of the upper nine or is thereby reduced to a rear admiral of the lower nine.

In an opinion of the Attorney General of November 17, 1862 (10 Op. 377), the Act there under consideration provided that chiefs of bureaus in the Navy Department should "receive a salary of three thousand five hundred dollars per annum, unless otherwise heretofore provided for by law, which shall be in lieu of all other compensation whatever." A rear admiral, with compensation as such at \$4,000 per annum when on shore duty, had been appointed chief of a bureau. Considering the question whether the compensation of that officer on shore duty should be reduced to that attached to the office of chief of bureau, the Acting Attorney General said:

"Such a result would involve injustice too gross to be imputed to Congress. The act limited the selection to naval officers, not below a certain grade, for the purpose of securing at the head of the bureaus named the

skill and experience of prolonged service. But nothing could be more unjust, and, indeed, more absurd, than to deprive the navy of the officers who possessed those qualities by transferring them to positions which, under the act, they can hold but four years, when, if not reappointed, they would be retired from the public service altogether. The law has no such operation. It simply means that the officers appointed shall, for the term specified, be assigned to these positions, and it implies no withdrawal from the list of officers, and no loss of rank or pay. If the officer, so assigned, receive less pay by virtue of his rank in the navy than the salary provided by the act, he is then entitled to draw the salary in lieu of his pay. But, if his naval pay exceed the salary, he is not bound to accept the latter and relinquish the former."

The words "unless otherwise heretofore provided by law" are considered in that opinion, but only as further showing that the construction adopted accords with the meaning of the statute, and the opinion concludes:

"The fair inference is, that Congress in such cases did not mean to limit to three thousand five hundred dollars the salary of an officer whose pay already exceeded that sum; but that he should, notwithstanding his assignment to the new duties, be paid according to his rank on the Navy list." (10 Op. 379.)

These reasons apply with equal force to the facts involved in the present case. The selection of the Chief of the Bureau of Ordnance, like that of the chief of bureau there under consideration, is limited to "the list of officers of the Navy, not below the grade of commander" (R. S. sec. 422), and I see no reason to dissent from the conclusion reached in that opinion.

Moreover, from an examination of the debates in Congress when the Act of 1910 was passed it does not appear that there was any intention to reduce the rank or compensation of any officer appointed chief of bureau. On the contrary, both Representative Foss, chairman of the Committee on Naval Affairs, and Representative Hull, chairman of the Committee on Military Affairs, stated that the

first portion of the paragraph of that Act in question made no change in existing law. (Cong. Rec. V, 45, pp. 8658-8660.) The previously existing law was the Act of March 3, 1899 (30 Stat. 1005), providing that "when the office of chief of bureau is filled by an officer *below the rank of rear admiral*, said officer shall, while holding said office, have the rank of rear admiral and receive the same pay and allowance as are now allowed a brigadier general in the Army," and the Act of May 13, 1908 (35 Stat. 128), providing that the pay and allowances of chiefs of bureaus "shall be the highest pay of the grade to which they belong, and *not below that of rear admiral of the lower nine.*"

The language of the Act of 1910, as well as that of the statutes above quoted, sufficiently indicates that the object intended to be accomplished was in the nature of a promotion rather than a reduction.

It is my opinion, therefore, that this officer remains a rear admiral of the upper nine, notwithstanding his appointment as Chief of the Bureau of Ordnance.

In response to the next question, (b) whether a new commission should be issued to him and, if so, as of what date, you are advised that in my opinion such a commission should not be issued. I reach this conclusion not only because, as stated in your letter, such a commission "would be identical with the one he now has excepting in the matter of dates and signature," and the statute should not be so construed as to require a futile or useless thing to be done; but also because, in the language of the statute, the new commission provided for is to be issued "in accordance with the rank and title hereby conferred," and, in the case of the officer now serving as chief of this bureau, no rank and title were thereby conferred, his rank, title, and grade being the same after his appointment as before, namely, that of rear admiral.

CHIEF OF THE BUREAU OF NAVIGATION.

As to the chief of this bureau, you state in your letter that—

"An officer of the line on the active list whose actual rank is that of captain, holding a commission as such, is

now serving as Chief of the Bureau of Navigation under a commission as chief of said bureau for the term of four years with the rank of rear admiral, and was so serving at the date of the approval of the Act of 1910. He has had 30 years' service."

From the memorandum of the Judge Advocate General accompanying your letter it appears that at the date of the Act of 1910 he had served 30 years.

The first question is:

"(a) Should a new commission issue to this officer and, if so, as of what date?"

The Act of June 24, 1910 (36 Stat. 608), expressly provides that—

"Such officers, after 30 years' service, shall be entitled to and shall receive new commissions in accordance with the rank and title hereby conferred."

As stated in my opinion of December 10 last (28 Op. 526, 530), the intention of the Act of June 24, 1910, including this provision for the issuance to officers who are eligible for retirement after 30 years' service and remain on the active list of a new commission "in accordance with the rank and title" theretofore conferred, was to make permanent the theretofore temporary rank, title, and emoluments of such officers. The language of the statute directing the issuance of a new commission is plain and it is my opinion that, to make its purpose effective, the officer in question, having served 30 years and remaining upon the active list, is entitled to and should receive a new commission "in accordance with the rank and title" possessed by him as chief of bureau.

As to the date of such commission, I beg to refer to an opinion by Attorney General Moody (25 Op. 299) construing a statute authorizing the retirement of officers of the Army, with the next higher grade. In holding officers subsequently nominated and confirmed as of its date entitled to the pay of the higher grade from the date of the Act, it was said:

"The statute does not indicate any postponement of the reward beyond its date. The general rule is that laws speak from the date of their enactment, and where, as here,

something remains to be done, not inconsistent, however, with a relation back when it is done, I think that rule may be applied."

That rule seems especially applicable in this case, in view of the emphatic direction of the statute that the officers "after 30 years' service, shall be entitled to and shall receive new commissions."

As the officer serving as chief of this bureau held that position and had served 30 years at the date of the approval of the Act of June 24, 1910, I am of the opinion that the new commission issued to him should be as of that date.

The next question is stated as follows:

"(b) If you are of the opinion that a new commission should issue to this officer, does that fact, or any other provision in the clause quoted above from the Act of 1910, create a vacancy in the grade of captain in such sense as to authorize the promotion of an officer to fill such vacancy?"

This question is governed by my opinion of December 10 last in the case of Mr. Washington L. Capps (28 Op. 526). Mr. Capps, while serving as Chief of the Bureau of Construction and Repair in your Department, became eligible to retirement after 30 years' service, which entitled him, under the Act of June 24, 1910, to "the rank, title and emoluments of a chief of bureau," and had received the new commission which that act directs in such cases. The situation of the officer serving as Chief of the Bureau of Navigation, when a new commission is issued to him, will be like that of Mr. Capps in all these particulars, except that the Chief of the Bureau of Construction and Repair has the "title" of chief constructor (R. S. sec. 1471), no such title being conferred upon the Chief of the Bureau of Navigation. It was there held (pp. 529, 530) that the concurrence of these circumstances did not "operate to establish a new *grade* in your Department and thus create a vacancy in the *grade* of naval constructor held by that officer while chief of bureau," and that "the sole purpose of the act was to make permanent the rank, title and emoluments of an officer serving

as chief of bureau who had become eligible for retirement by reason of age or length of service, but who preferred to remain upon the active list."

The proceedings in Congress at the time of its passage support this interpretation of the Act of June 24, 1910. The chairman of the Committee on Naval Affairs, in the House of Representatives (Cong. Rec. v. 45, p. 8660), said:

"Now, we provide in this amendment that where the chief of bureau might be removed from that position and serve on the active list that he shall not be demoted, that is, reduced to a captain or a lieutenant commander, but while on the active list shall have the rank that he held as chief of the bureau of the junior grade, corresponding to the brigadier general. That is the provision, and when he retires he shall retire as of that grade. It prevents his demotion, and nothing more and nothing less."

This question is therefore answered in the negative.

Your next question is:

"As the number of rear admirals is limited to eighteen, exclusive of additional numbers, would the commissioning of the Chief of the Bureau of Navigation as a rear admiral make him an additional number while on the active list in the already existing grade of rear admiral?"

Section 1362 of the Revised Statutes provides that:

"The active list of the line officers of the Navy of the United States shall be divided into eleven grades, as follows: * * *

"Third, Rear admirals, * * *

"Fifth, Captains. * * *."

The Act of March 3, 1899 (30 Stat. 1004, 1005), sec. 7, provides:

"That the active list of the line of the Navy, as constituted by section one of this Act, shall be composed of eighteen rear admirals, seventy captains, * * * *Provided*, That when the office of chief of bureau is filled by an officer below the rank of rear admiral, said officer shall, while holding said office, have the rank of rear admiral * * *."

As to officers advanced in rank "for eminent and conspicuous conduct in battle or extraordinary heroism," there is express statutory provision that they shall "be carried as additional members of each grade in which they serve." (Act of June 16, 1906, 34 Stat. 296; Act of March 3, 1901, 31 Stat. 1108; R. S. secs. 1506, 1605.)

The absence of such an express provision as to officers upon whom the additional rank, title, and emoluments of a chief of bureau have been permanently conferred by the Act of June 24, 1910, indicates that Congress, in enacting that statute, intended only that, in the language of the Act, such officers "eligible for retirement after thirty years' service," should have, "while on the active list, the rank, title and emoluments of a chief of bureau." This construction of that Act is confirmed by the above-quoted statement of the chairman of the Committee on Naval Affairs that "it prevents his demotion, and nothing more and nothing less." Furthermore, to hold otherwise would operate to increase the active Naval Establishment, a result not to be accomplished, as stated in my opinion of December 10 last (28 Op. 526, 530), in the absence of language "sufficiently explicit to clearly justify it."

As he retains his *grade* as captain notwithstanding his additional rank and emoluments and the issuance of a new commission (28 Op: 526), it follows, in any opinion, that he does not enter the *grade* of rear admiral, and therefore of course is not an additional number in that grade. I accordingly answer this question in the negative.

The next two questions are as follows:

"(d) Would he continue to be an additional number so long as he remains on the active list, or would the removal from the list of rear admirals of any one of them (not an additional number) be regarded as reducing the number of officers in that grade to the number authorized by law prior to the Act of 1910 and thus giving the list its authorized quota, including the present Chief of the Bureau of Navigation?"

"(e) The additional numbers in the grade of rear admiral hereinbefore referred to are advanced from the lower nine to the upper nine in said grade in accordance with

the provisions of the Act of March 3, 1901 (31 Stat. 1108), i. e., 'contemporaneously with and to take rank next after the officer immediately above him.' If you hold that the present Chief of the Bureau of Navigation be an additional number in said grade, shall he be advanced from the lower nine to the upper nine in that grade in accordance with the method just stated, or with the next following number."

As these questions are predicated upon the assumption that the officer in question is an additional number in the grade of rear admiral, my decision, in answer to your previous question, that he is not such an additional number in that grade, renders an answer to these inquiries unnecessary.

Your next question is:

"(f) Upon receiving a new commission under the Act of 1910 or at the later time when he will regularly be promoted in due course, regardless of said Act, will the present Chief of the Bureau of Navigation (whose actual rank is that of captain) be required to qualify for promotion to the grade of rear admiral under the provisions of secs. 1493 and 1496, Revised Statutes?"

The sections of the Revised Statutes referred to read as follows:

"SEC. 1493. No officer shall be promoted to a higher grade on the active list of the Navy, except in the case provided in the next section, until he has been examined by a board of naval surgeons and pronounced physically qualified to perform all his duties at sea.

"SEC. 1496. No line officer below the grade of commodore, and no officer not of the line, shall be promoted to a higher grade on the active list of the Navy until his mental, moral, and professional fitness to perform all the duties at sea have been established to the satisfaction of a board of examining officers appointed by the President."

As these sections in terms apply only to promotions of an officer "to a higher grade," and you have been advised, in answer to a previous question, that a new commission under the Act of 1910 does not remove this officer from the grade theretofore held by him, it follows that they

have no application when such new commission is issued to him. On the other hand, as he remains in the grade of captain, I see no reason why they should not apply "at the later time when he will regularly be promoted in due course, regardless of said Act", to the grade of rear admiral, and you are so advised.

Your next inquiry is:

"(g) If the present Chief of the Bureau of Navigation were commissioned from the date of the approval of the Act of 1910 and were actually advanced permanently to the grade of rear admiral over the heads of his seniors on that date in the grade of captain, as shown in the list given above, he would apparently, by such commission, take precedence over those officers on said list, theretofore his seniors in the grade of captain, by virtue of such commission (sec. 1467, R. S.) Would such precedence be permanent or would said chief of bureau remain at the foot of the list of rear admirals until Captain Badger (the officer next senior to him) has been promoted, and thereafter move up the list, step by step, as vacancies are made above him? In other words, if said chief of bureau be commissioned as rear admiral in accordance with the provisions of the Act of 1910, will his advancement in numbers and precedence be permanent or only temporary?"

Having already advised you that the issuance of a new commission to the chief of this bureau under the Act of 1910 would not advance him to the *grade* of rear admiral, a consideration of this question, which is based upon that premise, likewise becomes unnecessary.

CHIEF OF THE BUREAU OF SUPPLIES AND ACCOUNTS.

You state that—

"An officer of the pay corps on the active list whose actual grade is that of pay director with the rank of captain, holding a commission as such, is now serving as Chief of the Bureau of Supplies and Accounts with the title of Paymaster General under a commission as chief of said bureau for the term of four years with the rank of rear

admiral, having been appointed to that office subsequent to the approval of the Act of 1910. He has had 30 years' service."

The question is:

"Should a new commission be issued to this officer and, if so, as of what rank (commodore or rear admiral), and as of what date?"

The Act of June 24, 1910, as previously pointed out, plainly provides for the issuance of a new commission, and it is my opinion that, like the Chief of the Bureau of Navigation above mentioned, this officer is entitled to and should receive the new commission which the Act directs to be issued.

Section 1471 of the Revised Statutes, as amended by the Act of July 19, 1892 (27 Stat. 243, 245), provides that the Chief of the Bureau of Supplies and Accounts "shall have the *relative rank* of commodore while holding said position, and shall have * * * the *title* of Paymaster General."

The Act of March 3, 1899 (30 Stat. 1005, 1006, sec. 7), eliminates the word *relative* from this and other sections defining the rank of officers in the Navy, provides that officers serving as chiefs of bureaus shall "have the *rank* of rear admiral," and further, that this act shall not "be construed as changing the *titles* of officers in the staff corps of the Navy," to which corps officers of this bureau belong.

Having as chief of the bureau the *rank* of rear admiral, and retaining while on the active list, under the Act of 1910, "the rank, title, and emoluments" of a chief of bureau, it follows, in my opinion, that the new commission, "in accordance with the *rank* and title hereby conferred," should be with the rank of rear admiral, and you are so advised.

The above-mentioned Act of 1910 applies specifically to "all officers of the Navy who are now serving *or shall hereafter serve* as chief of bureau in the Navy Department," and, as previously stated, there is nothing to indicate an intention to postpone the date of the reward which the statute provides. I accordingly advise you that in my opinion this officer, appointed chief of bureau subsequent

to June 24, 1910, is entitled to a new commission as of the date when, having had 30 years' service, he thereafter began, in the language of the statute, to "serve as chief of bureau."

Respectfully,

GEORGE W. WICKERSHAM.

To the SECRETARY OF THE NAVY.

PROMULGATION OF AMENDED REGULATION OF THE PUBLIC HEALTH SERVICE.

The President has authority to promulgate the amended regulation 47 of the Public Health Service, which gives passed assistant surgeons a right to promotion to any vacancy in the grade of surgeon, whether a vacancy exists or not, after 12 years' service and passing an examination, provided they are appointed by the President, with the advice and consent of the Senate; and the fact that the amended regulation will or will not have an effect to create or increase a deficiency in the pay fund appears to bear upon its wisdom as an administrative measure and not upon its legality.

DEPARTMENT OF JUSTICE,
November 12, 1912.

SIR: I have the honor to acknowledge the receipt of your letter of the 19th ultimo in which you request my opinion as to the legality of a proposed change in paragraph 47 of the regulations of the United States Public Health Service. You present the matter in two aspects: First, has the President power to promulgate the amended regulation at all, i. e., is the amended regulation consistent with existing law. Second, will the necessary effect of the amended regulation be to create a deficiency in the fund for the pay and allowances of the commissioned medical officers in the sense that it will be contrary to the provisions of section 3679, Revised Statutes, as amended by section 3 of the Act of February 27, 1906 (34 Stat. 49).

Briefly, the change proposed in the regulations is this: The prior regulations merely provided that passed assistant surgeons should be *eligible* in the order of seniority to

NOTE.—This opinion was temporarily withheld from publication and later released.

promotion to any *vacancy* in the grade of surgeon subject to passing an examination. The amended regulations will give them a *right* to such promotion, whether a vacancy exist or not, after 12 years' service and passing an examination, provided they are appointed by the President, with the advice and consent of the Senate. The amended regulations, therefore, would have the effect, if acted on by the President and Senate, automatically to increase the number of surgeons by those passed assistant surgeons who, at any time, had served 12 years and had passed the required examination.

As pointed out in the opinion as to the appointment of the Surgeon General of the service (29 Op. 287), originally there was no provision by statute for the mode of appointment, number, or compensation of the officers of the Marine-Hospital Service (as it was formerly called), except the Supervising Surgeon General who, by the Act of March 3, 1875 (18 Stat. 485), was to be appointed by the President, by and with the advice and consent of the Senate, with a salary of \$4,000 per annum. Aside from him, the composition of the medical corps was determined by regulations issued by the Supervising Surgeon with the approval of the President and Secretary of the Treasury. The regulations of 1873 provided that the medical officers of the service should consist of a Supervising Surgeon, surgeons, and assistant surgeons, but fixed no number of the said officers. They were to be appointed by the Secretary of the Treasury on the recommendation of the Supervising Surgeon, and an applicant for the office of surgeon must be a graduate of a medical college and must pass an examination.

The regulations of 1879 added passed assistant surgeons and a medical purveyor to the medical corps, but still fixed no number, and did not change the method of appointment. They provided that original appointments should be made to the grade of assistant surgeon only; that no person should be appointed an assistant surgeon whose age was less than 21 nor more than 30 years, and that the applicant must be a graduate of a medical college and must pass an examination. Assistant surgeons, after three years'

service, were to be entitled to an examination for promotion to the grade of passed assistant surgeons, and vacancies in the grade of surgeon were to be filled by promotion from among the passed assistant surgeons in the order of seniority.

The Act of January 4, 1889 (25 Stat. 639), provided "that medical officers of the Marine Hospital Service of the United States shall hereafter be appointed by the President, by and with the advice and consent of the Senate," after a satisfactory examination; that original appointments should only be made to the rank of assistant surgeon; that no officer should be promoted to the rank of passed assistant surgeon until after four years' service, and that nothing in the Act should be construed so as to affect the rank of promotion of any officer originally appointed before the regulations of 1879.

As said in 29 Op. 287, 289, the purpose of this law was to give the appointment of the medical officers to the President and Senate, i. e., to make them regularly commissioned officers, and in other respects to give the sanction of Congress to the regulations of 1879 in so far as they related to appointment and promotions, with the minor change of three years to four in the requirement for promotion to passed assistant surgeon. The Act does not prescribe the number of the medical officers nor even fix their salaries, but, evidently with design, leaves this matter as it stood under the regulations, namely, within the jurisdiction of the Secretary of the Treasury and the President.

The Act of July 1, 1902 (32 Stat. 712), changed the name of the service to "the Public Health and Marine Hospital Service of the United States" and, perhaps, by section 3, created the office of assistant surgeon general, the number of incumbents of which is, by inference, to be six; but it did not otherwise purport to fix the number of the medical officers nor prescribe their salaries. On the contrary, it expressly provides that their salaries and allowances "shall be the same as now provided by regulations of the Marine-Hospital Service." Furthermore, section 9 provides "that the President shall from time to

time prescribe rules for the conduct of the Public Health and Marine Hospital Service."

The Act of August 14, 1912 (37 Stat. 309) again changed the name of the service to "the Public Health Service," created a new office to be known as "senior surgeon" of which there shall be ten, and for the first time fixed the compensation of the medical officers; but it makes no attempt to fix their number, and it expressly provides that "all regulations now in force, made in accordance with law for the Public Health and Marine Hospital Service of the United States shall apply to and remain in force as regulations of and for the Public Health Service until changed or rescinded."

The appropriations for the service have never shown any intent on the part of Congress itself to fix the number of the medical officers. The Act of July 16, 1798 (1 Stat. 605), simply provided for a tax on seamen and authorized the President out of the proceeds to provide for the relief and maintenance of sick and disabled seamen. The Act of June 29, 1870 (sec. 4803, R. S.), after regulating the custody of this fund, provided "such fund is appropriated for the expenses of the Marine Hospital Service, and shall be employed, under the direction of the Secretary of the Treasury, for the care and relief of sick and disabled seamen." Section 15 of the Act of June 26, 1884 (23 Stat. 57), provided that the expenses of the service should be borne by the United States out of receipts from duties on tonnage which were thereby appropriated for that purpose. The Act of June 26, 1884, was repealed by the Act of March 3, 1905 (33 Stat. 1214, 1217), and the expenses of the service are now provided for by a lump appropriation in the sundry civil bill, e. g., Act of August 24, 1912, "For pay, allowance and commutation of quarters for commissioned medical officers and pharmacists, \$437,780." (37 Stat. 435.)

From this survey of the legislation establishing the service and intrusting its management to the President and Secretary of the Treasury, and of the regulations, frequently recognized and sanctioned by Congress, which have

always been promulgated by the President, and have dealt with all matters concerning the appointment and promotion of medical officers, it is clear that the President possesses complete power to fix the number and regulate the appointment, promotion, and compensation of the medical officers, except in so far as this power has been abridged by Congress, and it is equally apparent that this power has been abridged only in (1) requiring the appointment to be with the advice and consent of the Senate, (2) in requiring appointments to the upper grades to be by promotion after an examination, (3) in requiring four years' service for promotion to passed assistant surgeon, (4) in fixing the number of assistant surgeons general and of senior surgeons, and (5) in defining and limiting the compensation of the officers. Further than this Congress has never gone. It follows that the original power of the President to fix the number in the respective grades of the medical officers and to regulate promotions so that in some period of years (which must be at least four in the case of assistant surgeons), after an examination, an officer of a lower grade shall become entitled to promotion to a higher, remains in full force and is as effective as ever. Of course such appointments can only be made with the advice and consent of the Senate, and the amended regulation can have no greater effect than as a rule for the guidance of the President himself, which he may modify or rescind at any time; but of his power to promulgate it I entertain no doubt.

This answer to your first question involves also the answer to your second. From your statement it appears that the practical effect of the amended regulation will be the immediate promotion of 31 passed assistant surgeons to the grade of surgeon at an increased cost of \$13,387.50; that while this increase alone will not exceed the appropriation of \$437,780 made for the service by the sundry civil appropriation act of August 24, 1912, the combination of this increase with the general increase in pay to the medical officers granted by the Act of August 14, 1912 (37 Stat. 309), will cause a deficiency in the appropriation. Under these circumstances does section 3679, Revised

Statutes, as amended by the Act of February 27, 1906, section 3 (34 Stat. 48), apply?

That statute, in so far as material, provides:

"SEC. 3679. No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. * * *"

It will be perceived that this Act has no application where the obligation involving the Government is one "authorized by law." This does not mean that it must be authorized by express provision of a statute. Many things are done by the various Departments acting under general direction of Congress or under regulations which have the sanction of Congress. Such things are "authorized by law" as fully as things directly provided for by statute. Where the acts in question are not legislative but executive in their nature, Congress may explicitly provide for the doing of the very thing, or it may confer power upon the Executive to do things of that character or to make regulations covering that class of things. Such things are "authorized by law" as fully in the one case as in the other.

Section 9 of the Act of March 4, 1909 (35 Stat. 945, 1027), provided, in brief, that no appropriation should be used to pay the compensation or expenses of any board unless the creation of the same had been "authorized by law." Certain Acts of Congress had authorized the President to make regulations for the government of the Life Saving Service, to appoint a general superintendent thereof who should, under the Secretary of the Treasury, have general charge of the service and of all administrative matters connected therewith, and the Secretary of the Treasury was authorized to cause to be investigated all devices for improvement of life-saving apparatus. Acting on the authority thus conferred, the Secretary of the Treasury constituted the Board of Life Saving Appliances. In 27 Op. 406, 408, it was held that this board, though not specifically

provided for by statute, was yet "authorized by law" within the meaning of the above Act. It was said that it was not the intent of Congress by such legislation "to interfere with or fetter the established conduct of administration in the Departments." The same ruling was made as to the "Niagara Falls Committee" in 27 Op. 432, 437, where it is said that by this Act "Congress did not intend to require that the creation of the commissions, etc., mentioned should be specifically authorized by a law of the United States, but that it would be sufficient if their appointment were authorized in a general way by law." So in the case of the medical officers of the Public Health Service, since Congress has left the matter of their number and promotion to the President, and has several times shown its acquiescence in the government of this matter by his regulations, appointments made by him and concurred in by the Senate are "authorized by law," and the obligation incurred thereby is excepted from the Act of February 27, 1906, *supra*.

It is true that Congress may indicate an intention to fix the number of certain offices, or to abolish them, or to regulate their compensation as well by an appropriation Act as by any other (*United States v. Fisher*, 109 U. S. 143; *Dunwoody v. United States*, 143 U. S. 578; *Belknap v. United States*, 150 U. S. 588). But the acts appropriating for the Marine Hospital Service or for the Public Health Service disclose no such intent. They either appropriate from an indefinite fund or grant a lump sum without indicating how it shall be divided. The case, therefore, presents the features merely of an insufficient appropriation for legally constituted offices, and it is settled that a mere deficiency of appropriation does not affect the validity of an office (*Graham v. United States*, 1 C. Cls. 380; *Collins v. United States*, 15 Ibid. 22, 35; *Peden v. United States*, 21 Ibid. 189, 190, *United States v. Langston*, 118 U. S. 389, 394). In *Geddes v. United States*, 38 C. Cls. 428, 444, the court said:

" * * * Neither is a public officer's right to his legal salary dependent upon an appropriation to pay it. Whether

it is to be paid out of one appropriation or out of another; whether Congress appropriate an insufficient amount, or a sufficient amount, or nothing at all, are questions which are vital for the accounting officers, but which do not enter into the consideration of a case in the courts. * * *

In the case now submitted to me, there appears a peculiar feature which furnishes an additional indication that Congress did not intend its lump appropriation in the Act of August 24, 1912, to control. On August 14, 1912, it had passed an Act increasing the salaries of the medical officers to take effect October 1; yet on August 24 it appropriated a gross amount insufficient to pay the salaries on this increased basis. It is evident, therefore, that the appropriation act does not purport to affect the offices themselves at all.

On the whole, therefore, I am of the opinion that the President has authority to promulgate the amended regulation 47, and that the Act of February 27, 1906, does not apply. The fact that the amended regulation will or will not have an effect to create or increase a deficiency in the pay fund appears to me to bear upon its wisdom as an administrative measure and not upon its legality.

Respectfully,

GEORGE W. WICKERSHAM.

To the SECRETARY OF THE TREASURY.

REORGANIZATION OF THE CUSTOMS SERVICE.

Under the provisions of the Act of August 24, 1912 (37 Stat. 434), relating to the reorganization of the customs service, the President is authorized to abolish positions such as those of naval officers, surveyors, appraisers, and assistant appraisers; to dispense with their statutory functions; to transfer the auditing functions of the naval officer to a deputy auditor for the Treasury Department or to a deputy collector of customs; to consolidate certain customs positions; to abolish the fee system and place all officers on a flat salary basis; to abolish the authority of collectors to sell blank manifests, etc.; and to require a protest

NOTE.—This opinion was temporarily withheld from publication and later released.

fee for the lodging of protests before the Board of General Appraisers or a similar board.

The President is not authorized to change the functions and personnel of the Board of General Appraisers; nor can he place in the classified civil service the Board of General Appraisers and collectors of customs, appraisers, surveyors, naval officers, and assistant appraisers.

The President is authorized to transfer or consolidate with the Bureau of Customs the functions now exercised by the Customs Division of the Treasury Department, by the Division of Special Agents of the Treasury Department, and such of the functions of the Appointment Division of the Treasury Department as pertain to customs matters; but he is unauthorized to transfer to the Bureau of Customs certain functions pertaining to imports and exports now exercised by the Bureau of Statistics of the Department of Commerce and Labor and he can not transfer to the Department of Commerce and Labor functions exercised by customs officers in enforcing the navigation laws.

The President may, within certain limits, increase the functions of the employees of the Customs Division, the special agents force, and the Appointment Division, and he may also increase the number of such employees other than the special agents.

Reduction of the cost of collecting the customs revenue to the maximum prescribed by the above Act is not a condition precedent, in a legal sense, to the taking effect of the reorganization.

The scheme of reorganization to be submitted to Congress need not show in detail the estimated items of reductions in expenditure, though it should contain some general estimate as to that matter.

The transfer of the auditing functions of the naval officer to a deputy auditor for the Treasury Department does not authorize the President to omit from the estimates for collecting customs revenue the expenses of such auditing work.

DEPARTMENT OF JUSTICE,

January 27, 1913.

SIR: I have the honor to acknowledge your letter of the 28th ultimo, calling my attention to certain paragraphs of the sundry civil appropriation act, approved August 24, 1912 (37 Stat. 417, 434), which reads as follows:

"To defray the expenses of collecting the revenue from customs, \$4,650,000, being additional to the permanent appropriation for this purpose for the fiscal year ending June thirtieth, nineteen hundred and thirteen. And the provisions of the act of March third, eighteen hundred and seventy-nine (Twentieth Statutes, page three hundred and

eighty-six), as amended by the act of April twenty-seventh, nineteen hundred and four (Thirty-third Statutes, page three hundred and ninety-six), authorizing the Secretary of the Treasury to expend out of the appropriation for defraying the expenses of collecting the revenue from customs such amount as he may deem necessary, not exceeding \$150,000 per annum, for the detection and prevention of frauds upon the customs revenue, are hereby further amended so as to increase the amount to be so expended for the fiscal year nineteen hundred and thirteen to \$200,000.

"Section thirty-six hundred and eighty-seven of the Revised Statutes of the United States is repealed to take effect from and after June thirtieth, nineteen hundred and thirteen.

"The President is authorized to reorganize the customs service and cause estimates to be submitted therefor on account of the fiscal year nineteen hundred and fourteen, bringing the total cost of said service for said fiscal year within a sum not exceeding \$10,150,000, instead of \$10,500,000, the amount authorized to be expended therefor on account of the current fiscal year nineteen hundred and twelve; in making such reorganization and reduction in expenses he is authorized to abolish or consolidate collection districts, ports, and subports of entry and delivery, to discontinue needless offices and employments, to reduce excessive rates of compensation below amounts fixed by law or Executive order, and to do all such other and further things that in his judgment may be necessary to make such organization effective and within the limit of cost herein fixed; such reorganization shall be communicated to Congress at its next regular session, and shall constitute for the fiscal year nineteen hundred and fourteen, and until otherwise provided by Congress, the permanent organization of the customs service."

You request my opinion as to the scope of the authority thereby granted to the President with special reference to his power in the following matters:

1. To change the functions of the Board of General Appraisers.

2. To change the personnel of the board.
3. To place the board in the classified civil service.
4. To place collectors of customs, appraisers, surveyors, naval officers, and assistant appraisers under the classified civil service.
5. To abolish the fee system and place all officers on a flat salary basis.
6. To create a bureau of customs, with a commission of customs, stationed at Washington. And if he has this power may he transfer or consolidate with this bureau the functions now exercised by the Customs Division of the Treasury Department, by the Division of Special Agents of the Treasury Department, and such of the functions of the Appointment Division of the Treasury Department as pertain to customs matters and the Bureau of Statistics of the Department of Commerce and Labor, so far as it pertains to imports and exports?
7. To abolish statutory positions, such as those of naval officers, surveyors, appraisers, and assistant appraiser.
8. To dispense with the statutory functions now required of the officers above mentioned.
9. To transfer the auditing functions of the naval officer to a Deputy Auditor for the Treasury Department or to a deputy collector of customs.
10. To abolish the authority of collectors of customs on the Canadian border to sell blank manifests and other customs papers for their private gain, under the provisions of section 2648 of the Revised Statutes.
11. To consolidate all customs positions, such as collector, surveyor, appraiser, and naval officer, under the head of collector of customs, making the other officers deputy collectors.
12. To require a protest fee for the lodging of protests before the Board of General Appraisers or a similar board.
13. To increase the number of employees or the functions, or both, of the present Customs Division, the special agents force, and the Appointment Division.

So far as I can discover, the purpose and scope of the above provisions were not explained in the reports of

committees to either the House or the Senate in the debates in either body, or in the conference reports, except that Mr. Fitzgerald, chairman of the House Committee on Appropriations, in a comprehensive résumé of the work of that committee, delivered on the last day of the session, said, *inter alia* (Cong. Rec., 62d Cong., 2 sess., v. 48, p. 11, 898):

“The sundry civil appropriation act, in addition to the large specific reduction of more than \$30,000,000, which it shows under the last law, provides for the most comprehensive and important administrative reform proposed since the Civil War. It will result in an annual saving by a reduction of expenditures of at least \$700,000 per annum and will insure an increased return from the more efficient administration of the customs service estimated at as high as \$20,000,000 yearly.

“The present organization of the customs service is archaic. It dates practically from the beginning of the Government. The service has never been reorganized. As the country developed and expanded new ports and sub-ports of entry have been established. Once established, no matter what the changed conditions, a port is never abolished. The expenses of maintenance is continued regardless of the necessity of the office. A former Assistant Secretary of the Treasury, noted for his capacity for organization, expressed the belief that with a proper organization probably 25 per cent of the present cost of the service could be saved. To illustrate the situation, in 1909 it cost twenty-two one-hundredths of a cent to collect a dollar of revenue at the port of New York, where 66 per cent of the customs are paid; at Annapolis, Md., it cost \$309.41; in Alexandria, Va., it cost \$122.49; in Natchez, Miss., it cost \$52.76. In 38 ports it cost more than a dollar to collect a dollar.

“At present Congress has practically no control over the expenditures for the collection of customs. Under the act of 1871, section 3687 of the Revised Statutes, \$2,750,000 is appropriated every six months to defray the expense of collecting the customs. This sum is so inadequate, however, that Congress has been appropriating \$5,000,000 addi-

tional for several years. For the last fiscal year it cost \$10,850,000.

"For many years Congress has been urged to repeal the permanent appropriation of \$5,500,000 annually, to make specific annual appropriations, as it does for almost every other service of the Government, and to reorganize the service by rearranging the districts, readjusting compensations, abolishing useless offices, and adopting modern and up-to-date methods in order that the very best results might be obtained with the least expenditure of money.

"In the sundry civil act this has been done. Plenary power has been given to the President to reorganize the service so as to place it upon the most efficient basis possible. After careful investigation it was determined that such results could be accomplished with an expenditure of \$700,000 less than for last year, and a limitation has been placed upon the authority granted, requiring that the reorganized service shall not require an expenditure of more than \$10,150,000 annually.

"This saving is not deducted from the appropriations made at this session for the current fiscal year. It will be gained in the next bill, while the Treasury will be further enriched by the increased efficiency in the administration of the customs law. As a part of this reform the law making the permanent appropriations has been repealed and the submission of detailed estimates for the consideration hereafter by Congress required:

"This same power over the internal-revenue districts and service was given to the President in section 3141 of the Revised Statutes. As a result the number of districts was cut in two. The internal revenues are collected, with better-paid officials in charge, for 2.02 per cent of the collections, while the customs duties, with poorer-paid officials in charge, costs 3.03 per cent of the collections, or 50 per cent more than the other service."

Construing the language of the enactment under consideration broadly, it might be taken to authorize the President to do any and every thing pertaining to the organization of the *customs service* which Congress could constitu-

tionally authorize. Nor does it clearly appear that an affirmative answer to all your questions would result in a confusion of legislative and executive functions as properly understood.

An act of Congress may be broad and general in its terms, attempting no more than an enactment of the leading principles governing the subject, in which case the proper field of the Executive will be correspondingly enlarged, or the act may be detailed and specific, defining the places where it is to be carried out, by what officers, their duties, tenure and compensation, in which case the function of the Executive may be confined merely to carrying out the specific directions of Congress. One form is as proper as the other, and both have been frequently employed without question from the beginning of the Federal Government, so that if the enactment now under consideration be construed as of the former class, there would appear to be no objection to it because it purports to confer very large powers on the President. (*Field v. Clark*, 143 U. S. 649; *Buttfield v. Stranahan*, 192 U. S. 470, 496.) Like power with respect to the collection of the internal revenue is given the President by section 3141 of the Revised Statutes and by the Act of March 3, 1877, c. 102, 19 Stat. 303.

There are two well-known canons of statutory construction which are to be considered in determining the scope of the enactment in question.

First, the broad construction suggested must rest, evidently, on the general words of the enactment, not on the special, and the extensive power claimed must therefore be derived from the authority granted "to reorganize the customs service" and "to do all such other and further things that in his judgment may be necessary to make such organization effective and within the limit of cost herein fixed." But between these two grants of power there are inserted certain specific instances of the kinds of power the President is to possess "in making such reorganization and reduction in expenses." They are "to abolish or consolidate collection districts, ports, and subports of entry and delivery, to discontinue needless offices and employments,

to reduce excessive rates of compensation below amounts fixed by law or Executive order." As a general thing, these special provisions would be held to limit the general ones to the extent that the latter would be confined to subjects of the same class or character as are dealt with in the special provisions. (*United States v. Stever*, 222 U. S. 167.)

This rule of construction, however, is not of a decisive character, being, like other rules of construction, indeed, merely an aid to discover the real intention of the legislature, and in the particular enactment now being considered the general purpose of the legislation and the particular collocation of words appear to indicate that the general language is meant to go somewhat beyond the special and deal with other subjects which Congress did not think it necessary to enumerate.

The key to the meaning of the enactment in question appears to lie in its repeal of section 3687, Revised Statutes, which made a permanent appropriation of \$5,500,000 annually for collecting the customs revenue (which permanent appropriation had for some time past been increased by an annual appropriation in the sundry civil act), and the substitution therefor of estimates for the whole needs of the service in the field, which estimates, however, are not to exceed \$10,150,000 annually, a less sum than had been appropriated in previous years. The attainment of this minimum of \$10,150,000 was the real end of this legislation, the reorganization of the service being ancillary to that end, since it was well understood that the large saving contemplated could not be effected without sweeping changes in the service. It may well be claimed therefore that the powers granted the President in the matter of the reorganization of that part of the service which is appropriated for in the sundry civil act and which is to be effected by the contemplated reduction in that appropriation are general, to the end that the desired reduction in cost of service may be attained, and that the special powers granted deal only with the abuses easily perceived and to which attention had been particularly called.

There is, however, a necessary limitation on this power arising from the purpose of the legislation as explained above. Whatever the President does in the way of reorganization of the customs service must be accomplished by the use of the appropriation made in the sundry civil act and must be confined within the maximum therein stated, to wit, \$10,150,000 annually. He necessarily can have no power to use any other appropriation in this particular reorganization nor to charge against this appropriation more than \$10,150,000. Subject to this qualification the Act, in spite of the grant therein of specific powers, appears by its general language to be meant to grant very extensive powers to the President.

But there is another canon of construction which must be considered. A number of your questions appear to contemplate changes in the customs service in a manner, directly or indirectly, contrary to the specific, special provisions of acts of Congress relating to that subject. In other words, an affirmative answer to such questions would result in a repeal, either wholly or *pro tanto*, of prior special statutes. The rule governing such repeals is thus stated by the Supreme Court in *Rodgers v. United States* (185 U. S. 83, 87, 88, 89) :

“ It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. In *Ex parte Crow Dog* (109 U. S. 556, 570) this court said :

“ The language of the exception is special and express; the words relied on as a repeal are general and incon-

clusive. The rule is *generalia specialibus non derogant*. 'The general principle to be applied,' said Bovill, C. J., in *Thorpe v. Adams* (L. R. 6 C. P. 135), 'to the construction of acts of parliament is that a general act is not to be construed to repeal a previous particular act unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C., in *Fitzgerald v. Champenys* (30 L. J. N. S. Eq. 782; 2 Johns. & Hem. 31, 54), 'that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.'

In Black on Interpretation of Laws (1896), 116, the proposition is thus stated:

"As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms, and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all."

So, in Sedgwick on the Construction of Statutory and Constitutional Law (1874), the author observes, on page 98, with respect to this rule:

"The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

It appears to follow from these expressions that prior special statutes relating to the customs service are not to

be considered repealed by the enactment now under consideration, except, first, that be the clear result of the special powers granted, and second, that it be impossible to give any fair meaning at all to the general words of the enactment consistent with the provisions of the prior statutes.

Applying these principles as accurately as the somewhat complicated character of the legislation dealing with the collection of customs revenues enables me, there appear to be certain of your questions which should receive an affirmative answer as fairly falling within the grants of power specifically conferred, when considered in connection with the general purpose of the enactment as explained above.

Thus the power "to discontinue needless offices and employments" would permit the President to abolish positions such as those of naval officers, surveyors, appraisers, and assistant appraisers (question 7); to dispense with their statutory functions (question 8); to transfer the auditing functions of the naval officer to a deputy auditor for the Treasury Department or to a deputy collector of customs (question 9); to consolidate certain customs positions (question 11). These offices are either "needless" (a matter which must necessarily rest largely in the sound discretion of the President), or they are "needless" in their present form and may be reformed under the larger power to "discontinue."

The power "to reduce excessive rates of compensation below amounts fixed by law or Executive order" would authorize the President to abolish the fee system and place all officers on a flat salary basis (question 5); to abolish the authority of collectors to sell blank manifests, etc., under section 2648, Revised Statutes (question 10); and to require a protest fee for the lodging of protests before the Board of General Appraisers or a similar board (question 12). This latter power is not expressly granted, to be sure, but it seems clearly in line with the direct purpose of the enactment, is not contrary to any statute, and is apparently nothing more than a mere matter of administration,

such is entrusted to the Secretary of the Treasury by sections 248 and 249, Revised Statutes.

Your first and second questions, however, which look to a change in the functions and personnel of the Board of General Appraisers, I must answer in the negative. That board was created by a detailed, comprehensive statute of June 10, 1890, sections 12 to 18 (26 Stat. 131, 136-139) as amended by the tariff act of August 5, 1909, sections 12 to 18 (36 Stat. 11, 98-101), which specifically provides for its personnel, tenure, compensation, and functions. I entertain little doubt that this board, though expressly given judicial as well as inquisitorial functions (*ibid.* sec. 13), is yet merely an administrative body, and therefore, as such, within the "customs service" which the President is authorized "to reorganize" by the provisions of the sundry civil act under consideration. This view is sustained by the omission of the board from the subsequently enacted Judicial Code and by the fact that the salaries of its members are appropriated for by the sundry civil appropriation act in the very paragraph now under consideration and not by the appropriations for the judiciary in the legislative, executive, and judicial appropriation act. But the position and functions of the Board of General Appraisers in the customs service, its composition, tenure, etc., are all, as said above, treated of and provided for in detail in an elaborately drawn statute which bears in every line the indication that the attention of Congress was especially directed to this subject. It is therefore extremely doubtful whether such legislation should be considered repealed on such important matters as the personnel and functions of the board by the general language of the enactment under consideration, nor is it apparent that this general language can not be given some effect in other directions which will still leave it consistent with the operation of the Board of General Appraisers under the provisions of the act of June 10, 1890, as amended.

It is also significant that the Board of General Appraisers, while it is, as said above, administrative in its nature, has yet important judicial power conferred upon it by

section 12 of the Act of June 10, 1890, as amended, which authorizes it "to hear and determine" cases brought before it; makes its decision in some cases final (*ibid.* sec. 13), and in any case subject only to review by the Court of Customs Appeal (*ibid.* sec. 14; Judicial Code, secs. 195, 196). (*Butterworth v. Hoe*, 112 U. S. 50.) The power to disturb this statutory method of deciding customs cases is one which I do not feel justified in drawing from such general language as that contained in the paragraph of the sundry civil bill now under consideration.

By your third and fourth questions you inquire as to the power of the President to place in the classified Civil Service the Board of General Appraisers and collectors of customs, appraisers, surveyors, naval officers, and assistant appraisers.

The act to regulate and improve the Civil Service (22 Stat. 403, 406) provides, by section 7, *inter alia*:

"* * * nor shall any officer not in the executive branch of the Government, or any person merely employed as a laborer or workman, be required to be classified hereunder; *nor, unless by direction of the Senate, shall any person who has been nominated for confirmation by the Senate be required to be classified or to pass an examination.*"

All the officers to whom you refer in questions 3 and 4 are, as I understand it, required by law to be "nominated for confirmation by the Senate" (Act of Aug. 5, 1909, *supra*, sec. 28, sub. sec. 12, R. S. Title XXXIV, ch. 1; 15 Op. 449; 29 *ibid.* 116, 117). Consequently, unless the grant of general powers to the President in the sundry civil act, *supra*, constitutes a "direction of the Senate" within the meaning of section 7 of the act to regulate the Civil Service, *supra*, an affirmative answer to your third and fourth questions would work a repeal, *pro tanto*, of said section 7, as to which I should feel the same doubt and for the same reasons stated in regard to your first and second questions.

In my judgment the general grant of power to the President in the paragraph of the sundry civil act being considered can not be treated as a "direction of the Senate."

This latter language seems to suggest a specific command affecting a specific officer or class of officers and can hardly be satisfied by a general grant of authority "to reorganize" a whole "service." "To reorganize" does not necessarily include the regulation of the method of appointment to office; and while I have no doubt that to place the officers you refer to in the classified service would directly tend to accomplish the end designed by Congress in the provision in the sundry civil act, *supra*, to wit, the effective and economical administration of the customs service, yet it is not impossible that that end may be accomplished and the general grant of power be given some substantial effect without repealing the specific provisions of the prior act dealing with the special subject of appointment to office.

Your sixth question inquires whether the President has the power "to create a bureau of customs, with a commission of customs, stationed at Washington; and if he has this power, may he transfer or consolidate with this bureau the functions now exercised by the Customs Division of the Treasury Department, by the Division of Special Agents of the Treasury Department, and such of the functions of the Appointment Division of the Treasury Department as pertain to customs matters, and the Bureau of Statistics of the Department of Commerce and Labor, so far as it pertains to imports and exports?"

The various "divisions" to which you refer in this question are, as I understand it, created by the various legislative, executive, and judicial appropriation acts, e. g., Act of August 23, 1912 (37 Stat. 360, 374):

"Division of Customs: Chief of division, \$4,000; assistant chief of division, \$3,000; law clerks—five at \$2,500 each, two at \$2,000 each; clerks—three of class four, three of class three, three of class two, six of class one, five at \$1,000 each; messenger; assistant messenger; messenger boy, \$360; in all, \$51,620.

"Division of Appointments: Chief of division, \$3,000; assistant chief of division, \$2,000; executive clerk, \$2,000; land and bond clerk, \$2,000; clerks—three of class four, four of class three, five of class two, six of class one, four

at \$1,000 each, one at \$900; messenger; two assistant messengers; in all, \$42,180.

* * * * *

"Division of Special Agents: Assistant chief of division, \$2,400; clerks—one of class three, one of class two, four of class one, two at \$900 each; messenger; in all \$12,840."

With the exception of the transfer to the bureau of customs of certain functions now exercised by the Bureau of Statistics of the Department of Commerce and Labor, I am of opinion that the President has authority to make the changes referred to in your sixth question. The power to reorganize the customs service extends to that portion of the departmental service which deals with customs matters. It necessarily includes the power to bring together and consolidate in one bureau those functions relating to such matters which are now distributed in different divisions of the Treasury Department. The same reasons already given for the affirmative answer to questions 7, 8, and 9 appear to be equally applicable here. If this consolidation can be effected by the use of the existing offices in the three divisions referred to, then the legislative, executive, and judicial appropriation for said offices may be used; but if it be necessary to create new offices or change the function of old ones, then the cost thereof must be charged against the sundry civil appropriation and must not have the effect to increase the estimates beyond the maximum of \$10,150,000.

The Bureau of Statistics of the Department of Commerce and Labor was transferred, in express terms, to that Department from the Treasury Department by the Act establishing the former Department (Act Feb. 14, 1903, sec. 4, 32 Stat. 826). By section 12 of this Act the President is authorized to transfer, at any time, from the other Departments to the Department of Commerce and Labor, any bureau, etc., engaged in statistical work, but the power to transfer in the other direction is not given. For the reasons stated in my answers to your first, second, third, and fourth questions, I am not able to infer, from the gen-

eral power granted in the sundry civil act, authority to disturb this arrangement established by a special enactment dealing with a particular subject.

Question 13 inquires whether the President can increase the number of employees or the functions of the Customs Division, the special agents force, and the Appointment Division.

I see no objection to increasing the functions of the said employees if they are kept within the line of service of collecting the revenues and are not exercised in violation of any express provision of law. Nor is there any objection to increasing the *number* of the employees of the Customs Division and of the Appointment Division, provided the cost thereof be included in the estimates furnished of the cost of collecting customs revenues and have not the effect to increase the same beyond the maximum of \$10,150,000.

There is, however, a reason against the implication of power to increase the number of the special agents. The number of these agents is specifically fixed by section 2649, Revised Statutes, as amended by the sundry civil appropriation Act of March 4, 1911 (36 Stat. 1393), and for the reasons given in my answer to your first and second questions I am unable to imply a repeal of this statute from the general provisions of the enactment under consideration.

The paragraph of the sundry civil act of August 24, 1912, now under consideration, provides that the reorganization created thereunder shall be communicated to Congress "at its next regular session." This necessarily refers to the present session, i. e., the third session of the Sixty-second Congress, and the scheme of reorganization must be communicated *at some time* during that session.

In your supplementary letter of the 7th instant you request my opinion on two further points arising under the same act.

1. Is the reduction of cost as provided a condition precedent to the taking effect of the reorganization plan?

2. Must the plan show in detail the estimated items of reductions in expenditure?

In my judgment the reduction of cost to the maximum of \$10,150,000, as provided, is not a condition precedent, in a legal sense, to the taking effect of the reorganization. To hold otherwise would be to invalidate the reorganization *in toto* if the smallest excess developed in the cost thereof, since, in dealing with conditions precedent, the law takes no notice of much or little. Besides, the matter is wholly within the control of Congress, which may approve or disapprove of the reorganization when submitted, as it sees fit.

The object of Congress in fixing a maximum of estimates and appropriation for the expense of collecting the customs revenue was, as stated above, to define the scope of and fix a limit to the general powers granted the President, and no powers, therefore, should be implied in the reorganization of the service, the exercise of which would cause the estimates to exceed the maximum. For instance, the power to discontinue needless offices may be exercised, though the final estimates of the reorganized service may exceed the maximum, that maximum not being a legal condition precedent; but a power may not be implied the exercise of which will necessarily increase expenses, or will effect only an apparent reduction, by transferring the cost of the particular service from one appropriation to another, although the result might be to render the service more effective.

In my opinion, the reorganization submitted to the present Congress need not show in detail the estimated items of reductions in expenditure, though it should contain some general estimate as to that matter. The estimates, however, to be submitted to the next Congress on account of the fiscal year 1914 must, in my judgment, be detailed and specific, but they need not show in detail the estimated items of reduction in expenditure, as this could be determined by a comparison with expenditures of former years.

In your supplemental letter of January 15 you inquire, as additional to question 6 of your original letter, whether or not the President has authority, under the provisions of the sundry civil act in question, to transfer to the Department of Commerce and Labor such of the present activities of customs officers as appropriately belong to that Depart-

ment, because exercised in enforcing the navigation laws and doing other things, jurisdiction over which is devolved by law on that Department, and thus relieve the appropriation for collecting the revenue from customs from the necessary expense incident to carrying on those functions.

I answer this question in the negative. The sundry civil act under consideration does not purport to deal with the function exercised by customs officers in enforcing the navigation laws, and no power, therefore, can be implied from that act to disturb those functions or to transfer them to another department.

You further inquire whether, if the President be authorized to transfer the auditing function of the naval officer to a deputy auditor for the Treasury Department, he is also authorized to omit from the estimate for collecting the revenue from customs the expense of such auditing work, leaving it to be included either contemporaneously or at a later time in the estimate for the appropriation to be expended in the Office of the Auditor for the Treasury.

For the reasons already given I answer this question in the negative. The expense of such work must be included in the estimates for collecting customs revenues, unless the functions referred to may be transferred to and taken care of by the auditor's office as now established.

Respectfully,

GEORGE W. WICKERSHAM.

To the SECRETARY OF THE TREASURY.

TRANSFER OF MACHINERY TO OTHER NAVY YARDS.

Machinery and tools appropriated for by Congress for the navy yards at New Orleans and Pensacola can not be transferred to other navy yards without legislative authority for such action.

DEPARTMENT OF JUSTICE,

January 30, 1913.

SIR: I have the honor to reply to your letter of the 16th instant, reading as follows:

"Some eighteen months ago the Department closed the navy yards at New Orleans and Pensacola, believing that

NOTE.—This opinion was temporarily withheld from publication and later released.

the use of these stations was unnecessary and extravagant. The Department now desires to transfer some of the machinery at these stations to other navy yards where it can be employed effectively and economically. I have the honor to request your opinion as to whether the Department has the authority to transfer the machinery and tools now of no longer use at New Orleans and Pensacola, and which were provided for under the Acts of June 7, 1900), June 29, 1906, and May 13, 1908, reading as follows:

“MACHINERY PLANT, NAVAL STATION, ALGIERS, LOUISIANA: Necessary machine tools required to fit up plant for repairs of engines, boilers, and so forth, of naval vessels, twenty-five thousand dollars. (Act of June 7, 1900.)

“Machinery plant, navy yard, Pensacola, Florida: For purchase of modern tools for use in repair of naval vessels, to replace others worn out, ten thousand dollars. (Act of June 29, 1906.)

“Machinery plant, naval station, New Orleans, Louisiana: For additional machine tools to complete the equipment of shops authorized and nearing completion, twenty-five thousand dollars. (Act of June 29, 1906.)

“Construction plant, naval station, New Orleans, Louisiana: Repairs to, and improvements of, plant at naval station, New Orleans, Louisiana, ten thousand dollars. (Act of May 13, 1908.)”

I notice upon examination of the statutes that the items mentioned by you are only a few of the appropriations in recent years for machinery and tools, and for repairs to and improvements of construction plants, at the navy yards at New Orleans (Algiers) and Pensacola.

It also appears that in addition to appropriating specifically for machinery and tools for those navy yards and others, the Acts making annual appropriations for the Navy Department have regularly contained authority for the purchase of machinery and tools for the navy yards generally.

There appears no provision of law expressly authorizing the transfer of the machinery and tools in question,

and if you have such authority it must result from your general powers as head of the Navy Department. It is a familiar rule that while the head of an Executive Department is limited in the exercise of his powers by law, he is not required to show statutory authority for everything he does. In the present case, however, Congress provided where the articles in question should be placed when purchased, and therefore no authority can be implied to transfer them elsewhere, unless the language used is to be regarded simply as directory. But this view is untenable, since it appears that the articles appropriated for were authorized because necessary for the proper equipment of the particular yards mentioned.

I note your statement that "some eighteen months ago the Department closed the navy yards at New Orleans and Pensacola, believing that the use of these stations was unnecessary and extravagant," and I understand it is because of this fact that the machinery and tools referred to have become useless at these yards.

Of course, if you had authority to close these navy yards permanently, it might be argued that such authority carried with it the right to remove the machinery and tools thus rendered useless. But you do not call my attention to any statute authorizing the permanent closing or abandonment of these yards, nor do I understand that there is any legislative authority for such action.

It appears from the statutes directing the selection of the sites of these navy yards that they were authorized by Congress in pursuance of a definite policy of its own with regard to the establishment of navy yards on or near the Gulf coast for the use of the Navy and the protection of the commercial interests of the United States. (See, as to Pensacola navy yard, 4 Stat. 48, c. 166; *ibid.*, 127, c. 95; as to New Orleans navy yard, 25 Stat. 463, c. 991.) You can have no implied authority, therefore, to do anything that would impair the efficiency of these yards. It is for Congress to determine whether the pecuniary saving which might result is a sufficient reason for their dismantling or abandonment.

The present situation is similar to that referred to in my opinion of December 7, 1910 (28 Op. 511), in respect to the floating dry dock at Algiers, La., the location of which I held you had no authority to change, because expressly selected by Congress.

Respectfully,

GEORGE W. WICKERSHAM.

To the SECRETARY OF THE NAVY.

ACQUISITION OF ALASKA NORTHERN RAILWAY CO.

The President has plenary authority to direct the Secretary of the Interior to execute a contract for the purchase of all the certificates of stock and all the first mortgage bonds issued by the Alaska Northern Railway Co., such purchase being, in effect, an acquisition of said railroad line within the meaning of the Act of March 12, 1914 (38 Stat. 305).

DEPARTMENT OF JUSTICE,

June 15, 1915.

SIR: I have the honor to acknowledge the receipt of your letter of April 27, 1915, in which you state that, as a representative of the President, and acting by virtue of his express direction, and in accord with an Executive order dated April 10, 1915, you have entered into a certain contract, under which you have agreed, on certain conditions, to buy, and in two installments to pay for, all the certificates of stock and all the first mortgage bonds issued by the Alaska Northern Railway Co. The recital of the purposes of the contract is as follows:

"Whereas, the vendee desires to acquire complete control and a clear title to all the assets and franchises of the Alaska Northern Railway Co.;

"And, whereas, the vendors represent that they are, subject to the charges thereon * * * hereinafter referred to, the owners of all the issued bonds and capital stock of the railway;"

NOTE.—This opinion was temporarily withheld from publication and later released.

and the contract is executed under the provisions of the Act of March 12, 1914 (38 Stat. 305), entitled "An act to authorize the President of the United States to locate, construct, and operate railroads in the Territory of Alaska, and for other purposes."

The question on which you ask my opinion is whether the above Act permits you, acting for the President, to acquire a railroad in Alaska by the method outlined in said contract. Under this Act, the President is "empowered, authorized, and directed * * *

"to designate and cause to be located a route or routes for a line or lines of railroad in the Territory of Alaska * * *;

"to construct and build a railroad or railroads along such route or routes as he may so designate and locate * * *;

"to purchase or otherwise acquire all real and personal property necessary to carry out the purposes of this Act;

"to exercise the power of eminent domain in acquiring property for such use * * *;

"to acquire rights of way, terminal grounds, and all other rights; * * *

"to purchase, condemn, or otherwise acquire upon such terms as he may deem proper any other line or lines of railroad in Alaska which may be necessary to complete the construction of the line or lines of railroad designated or located by him; * * *

"to make such other contracts as may be necessary to carry out any of the purposes of this Act."

The President is further, "empowered, authorized, and directed * * *

"to employ such officers, agents, or agencies, in his discretion, as may be necessary to enable him to carry out the purposes of this Act; to authorize and require such officers, agents, or agencies to perform any or all of the duties imposed upon him by the terms of this Act."

And it is further enacted that:

"it is the intent and purpose of Congress through this Act to authorize and empower the President of the United

States, and he is hereby fully authorized and empowered, through such officers, agents, or agencies as he may appoint or employ, to do all necessary acts and things in addition to those specially authorized in this Act to enable him to accomplish the purposes and objects of this Act."

I am of the opinion that the purchase of all the certificates of stock and all the first mortgage bonds of the corporation (provision being made for satisfaction by the vendor of all other outstanding obligations and liabilities) is, in effect, a purchase or acquisition of the railroad line, within the meaning of the Act.

It was the intent of Congress, as disclosed in the Act, that the President should provide for a railroad not exceeding 1,000 miles in length, to connect the harbors of the Pacific coast of southern Alaska with the navigable waters in the interior, and with a coal field, for governmental and public uses. The Act itself, as well as the debates in Congress, show that it was clearly within the contemplation of that body that instead of constructing the whole of this railroad, the President might utilize as part of the governmental road located by him, one of the two railroads then existing in Alaska; and might acquire such railroad either by purchase, or condemnation, or otherwise.

The Alaska Northern Railway Co. was chartered under the general corporation laws of the State of Washington. While, of course, it is elementary that neither the proprietorship of all the shares of capital stock, nor the ownership of all the securities issued by a corporation, confer upon the single shareholder or the single owner, as such, any legal title to the property of the corporation, nevertheless, the substantial ownership of the property of the corporation is in such shareholder or owner, though the nominal title be vested at law in the corporation. I am satisfied that the acquisition of the stocks and bonds under the contract, is, in effect, an acquisition of the railroad line by the Government, in compliance with the terms of the Act and the intent of Congress.

As the laws of the State of Washington contain ample provision for the dissolution of any corporation chartered by it, and as it will be entirely practicable for the United States to take steps, if it shall deem desirable, toward a dissolution of the corporation and the consequent vesting of its property in the owner of its shares, the purchase of the stock and bonds under the contract constitutes also an appropriate means for the ultimate acquisition of the physical property of the corporation the manner of acquiring which is left, under the statute, in the discretion of the President.

It further appears from a formal statement furnished to me by the counsel of the Alaskan Engineering Commission, that one of the chief purposes of the proposed purchase of the Alaska Northern Railway Co. securities is to obtain a temporary construction plant to be used in connection with the building of that portion of the main railroad which is to be constructed by the Government itself. In view of this fact, it may be that the purchase of shares and bonds provided for in the contract is sustainable as a purchase of personal property under that portion of the Act of March 12, 1914 (38 Stat. 306), which empowers the President "to purchase or otherwise acquire all real and personal property necessary to carry out the purposes of this Act."

If there were any doubt, whatsoever, as to the full authority of the President under the provisions of the Act above considered, there still remains the clause in the statute which grants to the President the power "to do all necessary acts and things in addition to those specially authorized in this Act to enable him to accomplish the purposes and objects of this Act," under which the President has ample and plenary authority to direct the Secretary of the Interior to execute the contract in question.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

To the SECRETARY OF THE INTERIOR.

INTERNATIONAL HARVESTER CO.—REFUND OF EXCESSIVE DRAWBACK ON IMPORTED PIG IRON.

Upon the facts submitted by the Treasury Department, a suit will lie against the International Harvester Co. to recover the excessive drawback paid on pig iron imported to be used in the manufacture of agricultural implements for export, and such suit may properly be brought for the full amount of the drawback paid to the Harvester company.

Whether such a suit is advisable under all the circumstances of the case is a question to be determined by the Secretary of the Treasury in the first instance in the exercise of administrative discretion.

DEPARTMENT OF JUSTICE,
November 28, 1916.

SIR: You have submitted for my consideration a claim against the International Harvester Co. for the refund of excessive drawback of duties on pig iron imported to be used in the manufacture of agricultural implements for export, and have requested my opinion as to whether suit by the Government is advisable, and if so, the amount for which the suit should be brought.

From the papers submitted there appears to be serious controversy between the Treasury Department and the Harvester company as to the facts of the case. Of course, no attempt has been made to examine the evidence or to determine what it may or may not establish. I can advise only as to the questions of law involved, and I take as the basis of this opinion the facts stated in the letter of the Acting Secretary of the Treasury of August 24, 1916, in response to my request for a connected statement of all the facts in the case as the Treasury Department contends them to be. It is assumed that the Government can establish these facts by satisfactory evidence.

The essential facts relied upon may be briefly stated as follows:

In the years 1903 and 1907 the Harvester company imported pig iron to be used in the manufacture of agricultural implements for export, paying the import duties in accordance with the provisions of the tariff act of 1897

NOTE.—This opinion was temporarily withheld from publication and later released.

then in force. Section 30 of that act authorized the refund of 99 per cent of the duties paid on imported materials when used in the manufacture of articles for export and provided "that when the articles exported are made in part from domestic materials the imported materials, or the parts of the articles made from such materials, shall so appear in the completed articles that the quantity or measure thereof may be ascertained." (30 Stat. 211.)

The section also provided as to such imported articles that they should be identified, their quantity ascertained, and the facts of the manufacture and exportation determined, under such regulations as the Secretary of the Treasury should prescribe.

Treasury decisions 24124, 24313, and 24454, promulgated in the light of the opinion of July 13, 1898 (22 Op. 111), authorized the payment of drawback on various kinds of agricultural implements manufactured by the Harvester company with the use in part of imported and domestic pig iron and cast scrap produced therefrom combined in stated fixed proportions.

The pig iron imported, as above mentioned, was used at the several factories of the Harvester company in the manufacture of agricultural implements until exhausted. As implements were from time to time exported, claims were made and allowed for the drawback of duties paid on imported pig iron represented by the Harvester company to have been used in the manufacture of such exported implements.

The claims so made and allowed were supported by sworn statements in which it was declared that the imported pig iron was used in the castings of the implements exported in the fixed proportions specified in the Treasury decisions above referred to, and that a separate true account of all imported materials and of all articles manufactured therefrom for export was kept at the place of manufacture.

Investigation made since 1914 has disclosed that the imported pig iron was used in combination with domestic pig iron in greatly varying proportions, fixed from day

to day by the chemist or foreman in charge and depending upon the character of the castings to be made and the quality of the two classes of pig iron available as determined by chemical analysis; that while the company kept a record at each of its foundries showing the percentages of imported pig iron used in the manufacture of castings from day to day, the conditions of subsequent manufacture and the manner of handling and storing the castings were such that it was impossible to determine in the case of any implements exported the date of production of the iron castings used therein or the quantity of imported pig iron contained in the castings; and that, although the imported pig iron was not used exclusively in the manufacture of implements for the export trade, a large part (perhaps two-thirds) being used in the manufacture of agricultural implements which were sold in the United States, the claims of the Harvester company for drawback on account of the use of imported pig iron in exported implements were nevertheless made and allowed on practically all the pig iron which the Harvester company had imported.

Upon these facts, it seems plain that the quantity or measure of the imported iron used in the exported implements was not correctly shown in the claims for drawback and that a substantial amount of drawback was paid on imported pig iron used in the manufacture of implements which were not exported but sold in the United States.

Clearly, section 30 did not authorize the drawback of duties on any imported materials that were not used in the manufacture of articles actually exported. Accordingly, the drawback allowed and received on imported pig iron used in implements not exported but sold in the domestic market must be held to have been erroneously paid to the Harvester company without authority of law.

It seems to be settled that moneys so paid out may be recovered as funds belonging *ex aequo et bono* to the Government. (*Wisconsin Central R. R. Co. v. United States*, 164 U. S. 190, 210-212.)

The question as to the amount for which suit should be brought arises apparently because (1) there is doubt as to

whether the erroneous statements in the claims for drawback destroy the right of the Harvester company to retain any part of the drawback received thereunder, and (2) there is difficulty in determining the exact amount of the excessive drawback.

If the claims had been fraudulently made, then upon the principle that fraud vitiates all into which it enters, there could be no doubt as to the propriety of suing for the entire amount that the Harvester company had obtained under the fraudulent claims. But if the claims were honestly made, and through an honest mistake either as to the facts or the law more drawback was paid than the law allowed, there would seem to be no reason for requiring the refund of the part that the company was legally entitled to receive, provided that part can be ascertained.

It is not indicated in the statement of facts furnished me or in the opinion of the Solicitor of the Treasury Department which you inclose that the Harvester company is to be charged with fraud. I accordingly assume that the agents of the Harvester company are to be regarded in the making of the claims for drawback as acting under an erroneous belief as to its rights and without any intention to injure or defraud the Government.

However, the confusion and doubt as to the amount of excess which ought to be refunded appears to be due to the erroneous representations made by the Harvester company. Since its mistake produced the difficulty, it ought to correct the mistake or suffer the consequences of failure to do so; and suit may properly be brought for the full amount of the drawback paid out, with a view to throwing upon the Harvester company the burden of defining the amount which it is entitled to retain. For, even if the Harvester company be not in the strict sense a spoliator within the maxim, "*Omnia praesumuntur contra spoliatorem*," it would, I think, nevertheless lie under an unfavorable presumption akin to that which arises from a spoliation. (See *Armory v. Delamirie*, 1 Smith's Leading Cases, 8th Ed., 679, 689; *Ryder v. Hathaway*, 21 Pick, 298, 306, 306.)

I accordingly hold upon the facts submitted as the basis for this opinion that a suit to recover the excessive drawback will lie and may properly be brought for the full amount paid to the Harvester company. Whether such a suit is "advisable" under all the circumstances of the case is a question to be determined by you in the first instance in the exercise of administrative discretion.

As already stated, this opinion is based upon the assumption that the facts relied upon can be established by satisfactory evidence. I think it proper to add that the case is one to maintain which clear and convincing proof of the right to recover will be exacted. The matters involved having been once settled, the presumption now is that what the law required to be done in connection with the proof and allowance of the drawback claims was properly done. These practical considerations are mentioned, in addition to the legal questions upon which I have expressed my opinion, as matters to be borne in mind by the officials of the Treasury Department in finally determining whether to ask that suit be brought.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

To the SECRETARY OF THE TREASURY.

**LOANS BY FEDERAL LAND BANKS—NORTH DAKOTA SEED
AND FEED BONDING ACT.**

Under the provisions of the Federal Farm Loan Act (39 Stat. 360), a Federal land bank has authority to make a loan secured by a first mortgage on farm land in North Dakota, if at the date when the mortgage is executed there is no other actual lien or encumbrance then in existence, notwithstanding the Seed and Feed Bonding Act of North Dakota creates as to all farm lands in the State a potentiality of encumbrances for seed grain and feed which may displace the lien of a first mortgage.

It clearly lies within the discretion of the Farm Loan Board, however, to refuse to approve such classes of first liens on farm lands as it may deem undesirable security for loans by reason of the potentiality of accrual of liens under the statute in question or otherwise.

NOTE.—This opinion was temporarily withheld from publication and later released.

DEPARTMENT OF JUSTICE,

March 28, 1918.

SIR: I have the honor to acknowledge receipt of your letter of March 23, 1918, in which you request my opinion: "whether, under the provisions of the Farm Loan Act, particularly those referred to in the Farm Loan Commissioner's letter of March 21, the Farm Loan Board would be justified in permitting the Federal Land Bank of St. Paul to continue to make loans in the State of North Dakota on the theory that the lien arising under the *seed and feed bonding act* of that State may be regarded as within the class of taxes, liens, judgments, or assessments which may be lawfully assessed against the land mortgaged."

The question presented seems to be whether in view of the provisions of the State statute referred to a first mortgage on farm lands in that State, executed after the date of the statute, will constitute a "first lien" within the meaning of the Federal Farm Loan Act (39 Stat. 360).

By section 12 of the Federal Farm Loan Act it is provided—

"that no Federal land bank organized under this Act shall make loans except upon the following terms and conditions: First, said loans shall be secured by duly recorded first mortgages on farm land within the land bank district in which the bank is situated" (39 Stat. 370),

and by section 18 it is provided that banks organized under the Act which shall have voted to issue farm loan bonds shall apply to the Federal Farm Loan Board for approval and "with said application said land bank shall tender to said farm loan registrar as collateral security first mortgages on farm lands qualified * * *." (39 Stat. 375.) It is further provided by section 2 as follows: "that wherever the term 'first mortgage' is used in this Act it shall be held to include such classes of first liens on farm lands as shall be approved by the Federal Farm Loan Board, and the credit instruments secured thereby." (39 Stat. 360.)

The clear intent of the Act is that the mortgage presented to a land bank as security for a loan shall be a

mortgage which constitutes a first lien on farm land on the date when the loan is made. That Congress evidently contemplated that there might later arise or accrue liens and assessments which by operation of law might take precedence of a prior-executed mortgage is clear from the provisions of the ninth subsection of section 12 as follows:

“Every borrower shall pay simple interest on defaulted payments at the rate of eight per centum per annum, and by express covenant in his mortgage deed shall undertake to pay when due all taxes, liens, judgments, or assessments which may be lawfully assessed against the land mortgaged. Taxes, liens, judgments, or assessments not paid when due, and paid by the mortgagee, shall become a part of the mortgage debt and shall bear simple interest at the rate of eight per centum per annum.” (39 Stat. 371.)

This subsection in the bill as it passed the House of Representatives provided that the borrower should covenant to pay when due “all taxes and local assessments.” The Senate broadened the scope of the covenant so as to include “all taxes, liens, judgments, or assessments.”

It is well recognized that by State and Federal legislation liens may be created to attach to real estate with precedence over prior encumbrances. Thus statutes almost invariably prescribe that State, county, and municipal taxes on real estate and on personalty and inheritance taxes shall constitute a first lien. The same priority may be given to excise tax liens. (See Revised Statutes, secs. 3186, 3251.)

Nor are such statutory liens confined to tax liens; they exist equally for the payment of assessments which are not strictly of the nature of taxes, such as water and gas rates, betterment assessments, drainage, irrigation, sidewalk, sewer, and numerous similar assessments. Such an assessment is not strictly a tax but is the compensation paid by the owner of the land for the value derived from a special improvement; “an assessment is a charge laid on individual property, because the property upon which the burden is imposed receives a special benefit which is different from the general one which the owner enjoys in

common with others as a citizen." (*Walker v. Jameson*, 140 Ind. 591, 594; *Wood v. Brady*, 68 Calif. 78.)

A tax lien may also be constituted by statute for the payment of an assessment in the nature of a penalty, see Revised Statutes, section 3309, in which it is provided that in case a distiller shall not have accounted for all the spirits produced by him, the commissioner may make assessment at the rate of 90 cents a gallon, and such assessments are constituted as liens on the spirits, the distillery, and the land and buildings from the time of assessment until paid; so, also, under Revised Statutes, sections 3629 and 3631, in case of officers of the United States who are delinquent in the payment of money entrusted to them "the amount due by any delinquent officer is declared to be a lien upon the lands, tenements, and hereditaments of such officer and his sureties, from the date of the levy in pursuance of the warrant of distress issued against him. * * * Conveyance of the marshal * * * shall give a valid title against all persons claiming under such delinquent officer or his sureties."

The general principle on which liens of this kind constituted by statute as having priority over first mortgages is based is well stated in *Provident Institution v. Jersey City* (113 U. S. 506):

"The ground on which the decision below was placed was, that the laws having made the water rents a charge on the land, with a lien prior to all other encumbrances, in the same manner as taxes and assessments, the complainant took its mortgages subject to this condition, whether the water was introduced on to the lot mortgaged before or after the giving of the mortgage and hence the complainant had no ground of complaint that its property was taken without due process of law.

"We do not well see how this position can be successfully controverted." * * *

"Much discussion has taken place in the State courts as to the precise nature of these water rents: whether they are a tax, or an assessment for benefits, or a stipulated compensation resting on implied contract." * * *

"The mortgages of the complainant were not created prior to that statute, but long subsequent thereto. When the complainant took its mortgages, it knew what the law was; it knew that, by the law, if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgages subject to this law; and it is idle to contend that a postponement of its lien to that of the water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act, its own consent, is an element in the transaction." * * *

"Even if the water rents in question can not be regarded as taxes, nor as special assessments for benefits arising from a public improvement, it is still by no means clear that the giving to them a priority of lien over all other encumbrances upon the property served with the water would be repugnant to the Constitution of the United States. The law which gives to the last maritime liens priority over earlier liens in point of time, is based on principles of acknowledged justice. That which is given for the preservation or betterment of the common pledge is in natural equity fairly entitled to the first rank in the tableau of claims. Mechanics' lien laws stand on the same basis of natural justice. We are not prepared to say that a legislative act giving preference to such liens even over those already created by mortgage, judgment or attachment, would be repugnant to the Constitution of the United States. Nor are we prepared to say that an act giving preference to municipal water rents over such liens would be obnoxious to that charge. The providing a sufficient water supply for the inhabitants of a great and growing city, is one of the highest functions of municipal government, and tends greatly to enhance the value of all real estate in its limits; and the charges for the use of the water may well be entitled to take high rank among outstanding claims against the property so benefited."

See also *Brooks v. Railway Co.* (1879), 101 U. S. 443; *Gilchrist v. Helena Hot Springs & Smelter R. R. Co.*

(1893), 58 Fed. 708; *Central Trust Co. v. Charlotte, etc. R. R.* (1894), 65 Fed. 257; *Southern Ry. Co. v. Bouknight* (1895), 70 Fed. 442; *Jones v. Great Southern Fireproof Hotel Co.* (1898), 86 Fed. 370, 388; *King v. Thompson* (1901), 110 Fed. 319.

It is evident from the provisions of section 2 of the Federal Farm Loan Act giving to the Federal Farm Loan Board a discretionary power to discriminate between the different classes of first liens on farm lands which it will approve as the first mortgages on which loans might be made, that Congress intended that this board should, in granting or withholding its approval, take into consideration the possible extent to which under existing statutes any particular class of first liens on farm lands might be displaced by the later accrual of taxes, liens, and assessments on the mortgaged lands. The degree of possibility of such accrual would to a large extent determine the safety or desirability of loans on security subjected to such possible displacement of priority.

While, however, this factor might undoubtedly affect the judgment of the Federal Farm Loan Board, it would not necessarily affect the legal authority of the board to approve the first liens, nor the legal authority of a Federal Land Bank to make loans under section 12 of the Act.

With these general considerations in view, the provisions of the *seed and feed bonding act* (House bill No. 1), passed at the special session of the Fifteenth Legislative Assembly of North Dakota, January 30, 1918, may now be stated. This is an act amending and reenacting certain sections of the Compiled Laws of North Dakota for the year 1913, "authorizing counties to issue bonds and warrants to procure seed grain and feed for needy inhabitants therein and providing for the issuance of bonds and warrants for seed grain by counties and aid by the State in respect thereto, and making an appropriation therefor." By sections 1 to 6, inclusive, provision is made for the issue and sale of bonds by a county (under certain conditions) to purchase seed grain and feed for the inhabitants who are in need and are unable to procure the same. By section 7 it is provided that

"all persons entitled to, and wishing to avail themselves of the benefit of this article, shall file with the county auditor, on or before the twentieth day of March" a sworn application stating in detail his needs; if the applicant is a renter, the owner of the land must sign the application with him, unless exception is made by the county commissioners. By section 8 it is provided that the board of county commissioners shall, on or before the 25th day of March, examine and consider the applications filed and determine who are entitled to the benefits of the act and the amount to which each applicant is entitled, and "shall deliver and file with the county auditor its adjustment of the said applications." By section 9 it is provided that the county auditor shall thereupon issue to each applicant an order for the amount of seed grain and feed which has been so allowed to the applicant, provided, however, that the order shall not be delivered until the applicant shall have signed a contract, "which contract shall have the same force and effect as a promissory note," agreeing to pay to the county the amount of cost of said seed grain and feed on the 1st day of October. It is further provided that if the indebtedness is not paid on or before the 15th day of October "it shall then be the duty of the county auditor of said county to cause the amount of said indebtedness to be entered upon the tax lists of said county then in the hands of the county treasurer, as a lien against the land owned by the applicant for which said seed and feed were furnished, to be collected as taxes are, and the sum so entered and levied shall be a lien upon the real estate owned by said person, for which said seed and feed were furnished, until said indebtedness is fully paid." It is further provided that if the applicant is a renter, the owner of the land shall also sign the contract, and in such case "the county shall in addition have a lien upon all real estate of such owner upon which said seed and grain was sown."

It is further provided by section 10 as follows:

"Contract made first lien. Under the filing of the contracts provided for in section 3480 the county shall acquire a just and valid lien upon the crops of grain and feed

raised each year by the person receiving seed grain and feed to the amount of the sum then due to the county upon said contract, which shall as to the crops covered thereby have priority over all other liens and encumbrances thereon, except threshers and labor liens.

"The county shall in addition have a lien, if the owner of the real estate has signed the application and note, upon all real estate described in the application upon which said grain is to be sown, which shall have priority over all encumbrances except those existing at the time this act goes into effect. And the filing and recording of said contract shall be held and considered to be full and sufficient notice to all parties of the existence and extent of said lien upon said crops of grain and feed raised, and upon said land, which shall continue in force until the amount covered by said contract shall be fully paid."

It thus appears that the statute in question provides for an application to be made each year before March 20 by a renter or owner of land for county aid in obtaining seed and feed. By making such an application a land renter or owner does not subject himself to any obligation nor his land to any lien or encumbrance. It is not until he signs and delivers to the county the promissory note provided for by section 9 that he incurs any actual indebtedness, and such note does not become an encumbrance upon the land until failure to pay the same on or before the 15th day of October. In case of such failure, a lien accrues on October 15, which lien extends not only to the crops of grain and feed raised that year, but also to all real estate described in the application upon which the grain is to be sown. This lien, by the express provisions of the act, has priority over all encumbrances except those existing at the time the act went into effect.

The power to create a lien for such an assessment against a person holding a first mortgage executed after the enactment of the statute seems undeniable. (*Provident Institution v. Jersey City*, 1885, 113 U. S., 506, and other cases cited *supra*.) Statutes providing for the supply of seed to farmers have long been on the statute books both in North

Dakota and in Minnesota (see Laws of Dakota, 1889, c. 43; Acts of Minnesota, 1878, c. 93); and the constitutionality of an Act of February 14, 1890, of North Dakota "authorizing counties to issue bonds to procure seed grain for needy farmers resident therein" and providing for the levy of a general tax for the purpose was upheld in *State of North Dakota v. Nelson County* (1 N. Dak., 88). The statute now in question does not come within the constitutional inhibition against the impairment of the obligation of contract, for it in terms does not apply to mortgages and other encumbrances existing at the date of its enactment.

The effect of the statute in question is in substance to make it possible for any owner of farm land in North Dakota at any time after giving a first mortgage to bring into existence by his voluntary action a lien which by virtue of the statute will take precedence over the mortgage which he has previously executed. In other words, the statute creates as to all farm lands in the State a potentiality of encumbrance which may displace the lien of a first mortgage. Such a potentiality, however, is not uncommon in the legislation of the various States of the Union. Thus in Oklahoma (section 7606 of the Revised Laws of Oklahoma, 1910) provision is made whereby any owner of real estate in any county in which a permanent highway is proposed to be constructed may contribute a sum which by his written agreement may be divided into 10 annual installments and assessed on his real estate annually and collected in the same manner as taxes; and it is provided that after the filing of the pledge of contribution and its acceptance by the board of county commissioners "the same shall become and be a lien upon said property with all the effect of any tax that may be levied against the same; so also in Florida (section 2208 of the Compiled Laws of Florida, 1914) persons loaning money or advancing goods or merchandise to aid another in the business of planting, farming, timber getting, etc., acquire a lien on the crops, products, and lumber produced "through the assistance of said loan or advances," which lien is a "statutory lien of prior dignity to all encumbrances" excepting

laborers' and landlords' liens. In both of these instances the Act which brings the lien into being may be a voluntary act of the mortgagor, performed subsequent to the execution by him of a first mortgage.

I am of opinion that such a potentiality does not prevent a first mortgage from being a "first lien" within the meaning of the Federal Farm Loan Act, if at the date when the mortgage is executed there is no other actual lien or encumbrance then in existence. If, therefore, at the time when the mortgage on North Dakota farm lands is executed, the lien shall not have actually accrued under the terms of the statute, and if there is no other existing encumbrance, such mortgage would, in my opinion, constitute a "first lien" when made, notwithstanding the possibility of its subsequent displacement, in case the landowner should subsequently act in such manner as to give rise to the lien provided for by the statute.

Being such a "first lien," the Federal Land Bank would have authority to make a loan to the person who tenders such mortgage as security.

I feel, however, that I should state at the same time that it clearly lies within the discretion of the Farm Loan Board to refuse to approve such classes of first liens on farm lands as it may deem undesirable security for loans by reason of the potentiality of accrual of liens under the statute in question or otherwise. It frequently happens that water, school, levee, drainage, overflow, swamp, irrigation, reclamation, logging, and road districts and similar quasi-municipal corporations may have issued or may be about to issue obligations to such a large amount as compared with the value of the lands embraced in such districts that the possibility of tax liens accruing for the payment of such obligations may be so great as to render doubtful the value of first mortgages which may have been or may be placed upon such lands. In such a case the Federal Farm Loan Board would be called upon, under section 2 of the Act, to consider whether first mortgages on lands embraced within such districts constituted a class of "first liens on farm lands" which the board would be

warranted in approving. In my opinion, the existence of the North Dakota statute and the possible liens which may arise thereunder on all lands in North Dakota present the same general questions for the consideration of the Federal Farm Loan Board in the exercise of its sound discretion in approving loans upon lands so situated.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE TREASURY.

TAX ON BEER.

Beer upon which the tax imposed by previously existing law had been paid, and which had been removed from Government custody prior to the passage of the Revenue Act of February 24, 1919, is not subject to the additional tax imposed by section 608 of the latter Act.

DEPARTMENT OF JUSTICE,

March 29, 1919.

SIR: I have the honor to acknowledge receipt of your letter of March 21, requesting an opinion as to the proper construction of section 608 of the Act approved February 24, 1919 (40 Stat. 1109), which reads as follows:

“That there shall be levied and collected on all beer, lager beer, ale, porter, and other similar fermented liquor, containing one-half of one per centum, or more, of alcohol, brewed or manufactured and hereafter sold, or removed for consumption or sale, within the United States, by whatever name such liquors may be called, in lieu of the internal-revenue taxes now imposed thereon by law, a tax of \$6 for every barrel containing not more than thirty-one gallons, and at a like rate for any other quantity or for the fractional parts of a barrel authorized and defined by law, to be collected under the provisions of existing law.”

The questions which you submit are (1) whether under the language of this section beer upon which the tax imposed by previously existing law had been paid and which had been removed from Government custody prior to the passage of the new Act is subject to the additional tax

NOTE.—This opinion was temporarily withheld from publication and later released.

thereunder, and (2) whether, in case any additional tax at all is due, the full tax of \$6 per barrel imposed by the Act of February 24, 1919, is to be paid in addition to any tax previously collected, or whether the additional tax shall be only the difference between the tax previously paid and the tax imposed by the new statute.

The solicitor of internal revenue, in an opinion which you submit with your request, has reached the conclusion that the first question must be answered in the negative. If he is right about this, of course an answer to the second question becomes unnecessary. After careful consideration, I am of opinion that the conclusion reached by the solicitor of internal revenue is correct.

Similar acts previously passed, like the Act of October 3, 1917, levied a tax on fermented liquor "brewed or manufactured and sold, *or stored in warehouse*, or removed for consumption or sale." The Act now under consideration omitted the words "or stored in warehouse." It is clear that the result is that the Act applies only to liquor thereafter brewed, or manufactured and sold, or removed for consumption or sale. The beer referred to in your first question was not brewed after the Act took effect, nor was it manufactured and sold after that date. The expression "removed for consumption or sale" has come to mean removed from the place of manufacture or out of Government custody and control for consumption or sale. In the case of the beer referred to, this had been done prior to the passage of the Act.

I am therefore of opinion that beer upon which the tax imposed by previously existing law had been paid, and which had been removed from Government custody prior to the passage of the new Act, is not subject to the additional tax imposed by that Act.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.

**INCOME TAX—CONTRIBUTIONS BY CORPORATIONS TO
RED CROSS OR OTHER WAR ACTIVITIES.**

Corporations are not entitled to deduct from their gross income for the purposes of the income tax the amount of contributions made to religious, charitable, scientific, or educational corporations or associations, even though such contributions are made to the Red Cross or other war activities.

DEPARTMENT OF JUSTICE,

May 19, 1919.

SIR: Replying to your letter of April 19, in which you request my opinion upon the question arising in the enforcement in the Treasury Department of Title II of the Revenue Act of 1918 (40 Stat. 1058), whether corporations are entitled to deduct from their gross income, for the purpose of the income tax, the amount of contributions to religious charitable, scientific, or educational corporations or associations; the question arising most frequently with reference to contributions made to the Red Cross or other war activities I advise as follows:

Title II, in providing taxes to be paid by the taxpayer, separates the taxpayers into two general classes. Part II states the taxes imposed upon and to be paid by individual taxpayers. Part III states the taxes imposed upon and to be paid by corporations. Part II, section 214, states the deductions allowed to individuals. Part III, section 234, states the deductions allowed corporations.

In the deductions allowed individuals are included (40 Stat. 1066):

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, etc.

(2) All interest paid or accrued within the taxable year on indebtedness, etc. (with certain exceptions).

(3) Taxes paid or accrued within the taxable year, etc. (with certain exceptions).

(4 et seq.) Certain allowances for losses; bad debts; exhaustion, wear and tear of property of various sorts.

NOTE.—This opinion was temporarily withheld from publication and later released.

Paragraph 11 allows deductions for contributions or gifts made within the taxable year to corporations organized and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, etc.

Part III, section 234 (40 Stat. 1077), stating the deductions allowed in computing the net income of corporations, allows as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, etc.

(2) All interest paid or accrued within the taxable year on its indebtedness (with certain exceptions).

(3) Taxes paid or accrued within the taxable year, etc. (with certain exceptions).

(4 et seq.) Losses sustained of a certain character; bad debts; allowances for exhaustion, wear and tear, etc.

There is no item of deduction allowed for contributions such as is contained in paragraph 11 of items of deduction specified in the case of individual taxpayers.

The question presented is not whether corporations may lawfully make such contributions or gifts, but whether they fall within one of the deductions allowed to be made from gross income in ascertaining the net incomes of corporations subject to the tax. It is clear that there is no express deduction permitted of such contributions or gifts, and unless, therefore, they fall within the definition of some item of deduction allowed to corporations by section 234, Part III, Title II, of said Revenue Act, they are not permitted.

The only head within which it might be suggested that such contributions could be included is that of expenses.

The language used in this exemption is very guarded, and permits the deduction only of—

“All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to

be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity." (40 Stat. 1077.)

It will be observed that all expenses are not allowed, but only ordinary and necessary expenses; also, of ordinary and necessary expenses, only those paid or incurred in carrying on any trade or business, including reasonable salaries or compensation, rentals, and payments for use of property as above defined. Practically these same deductions are permitted in section 214 in the case of individuals; and had such words included the contributions or gifts mentioned in paragraph 11 of section 214, it would have been unnecessary to put in such paragraph, as they would have been covered by paragraph 1 of said section. It is also evident that the ordinary and necessary expenses contemplated by paragraph 1 of sections 214 and 234, allowing deduction of ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business in the case of both individuals and corporations, were not intended to include all necessary expenses because the two immediately succeeding paragraphs provide for deducting interest and taxes, both of which will be recognized as necessary expenses; also the provision in regard to allowance for salaries, compensation, rentals, etc.; indicates that all of the expenses, which are contemplated under the terms used in paragraph 1 of these two sections, are expenses incurred directly in the maintenance and operation of the business, and not all those which may be beneficial or even necessary in the broader sense.

In addition to the above considerations, and to the fact that there is express provision for deducting contributions or gifts in the case of individuals, which is wanting in the section providing for deductions to be made by corporations, the Congressional Record shows that when the revenue bill was under consideration an amendment was offered providing that corporations might make deductions of contributions or gifts as in the case of individuals. This amendment came to a vote and was de-

feated, the principal reason assigned in the debate being that it would be dangerous to authorize directors to be generous with the money of their stockholders even for such laudable purposes. This presents, therefore, a legislative history, not only showing the impressions of individual members, but an action by one of the Houses of Congress expressly refusing to permit the deduction under consideration in the case of corporations.

I am therefore compelled to conclude and to advise that corporations are not entitled to deduct from their gross income for the purposes of the income tax the amount of contributions made to religious, charitable, scientific or educational corporations or associations, even though such contributions are made to the Red Cross or other war activities.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.



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ERRATA.

Page 625: Reference to liquors appearing under Bonds should be under Beverages.

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2. Sale of Enemy-Owned Patent to United States.—Under a provision of the act of March 23, 1918 (40 Stat. 460), which amends section 12 of the trading with the enemy act, the Alien Property Custodian can, for a fair and substantial consideration, sell any property, of which he becomes possessed, to the United States, but he can not sell such property for a merely nominal consideration. 463.

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ARMY.

1. Officers.—Appointment in Veterinary Corps.—The selective service act of May 18, 1917 (40 Stat. 76), authorizes the President to appoint officers of the grades of colonel and lieutenant colonel in the Veterinary Corps, United States Army. 367.
2. Same.—Prosecution of Claims Against United States.—An officer in the United States Army is not by virtue of that fact alone an officer in the War Department within the meaning of section 190 of the Revised Statutes, which relates to the prosecution of claims against the United States. 471.
3. Same.—Where, however, Congress creates an office or bureau in the department and authorizes the appointment of an Army officer to the office, or in the bureau, such Army officer, after receiving his new appointment, would fall within the reach of section 190 of the Revised Statutes, for he would then be an officer in the department. 471.

ARMY—Continued.

4. **Status of Army Field Clerks.**—Army field clerks may be appointed by The Adjutant General, without respect to the rules and regulations of the Civil Service Commission, and from the date of their appointment they are solely within the control of the Rules and Articles of War and not subject to the rules and regulations of the Civil Service Commission. 133.

See also WAR RISK INSURANCE ACT, 2.

ARMY APPROPRIATION ACT. *See* NAVY, 7, 8; **SELECTIVE SERVICE ACT**, 1.

ARMY FIELD CLERKS. *See* ARMY, 4.

ATLANTIC COMMUNICATION CO.

PATENT RIGHTS. *See* RADIO APPARATUS.

ATTORNEY GENERAL.

1. **Questions Not Arising in Administration of Department—Redemption of War-Savings Certificates and Stamps.**—The Attorney General declines compliance with the request of the Postmaster General for an opinion as to the validity of articles 9 and 10 of the Treasury Regulations, relating to the redemption of war-savings certificates and stamps of deceased owners, because the question is not one arising in the administration of the Post Office Department. 234.
2. **Same.**—The Attorney General does not at the present time feel at liberty to express an opinion upon certain questions propounded by the Secretary of War, because they seem unrelated to the question which has actually arisen in the administration of his department and can hardly have any material bearing on that question. 463.
3. **Same.**—In the absence of a statement showing the result of a search for laws other than section 190 of the Revised Statutes bearing upon the question propounded by the Secretary of War, the Attorney General feels constrained, under the rules governing the rendition of opinions, to withhold a categorical answer upon the point. 472.
4. **Same.**—The question propounded by the Secretary of the Interior as to whether the payments provided for under section 4756 of the Revised Statutes are within the purview of the term "pensions" as used in the act of June 30, 1914 (38 Stat. 398), pertains rather to the administration of the Navy Department than of the Department of the Interior, and as the Secretary of the Navy has not requested an opinion with respect to this question, the Attorney General is precluded by the settled rule of his department from expressing an opinion in regard to it. 127.

INTERPRETATION OF EXPRESSIONS OF OPINION IN LETTER OF OCT. 13, 1913, TO SECRETARY OF WAR. *See* CANAL ZONE, 2.

AUDITORS.

ESTIMATES, TREASURY DEPARTMENT. *See* CUSTOMS SERVICE, 7.

AWARDS.

EXPROPRIATED LAND. *See* CANAL ZONE, 1, 2.

BANKS.

ADVANCES BY WAR FINANCE CORPORATION. *See* WAR FINANCE CORPORATION ACT.

CHECK CLEARING, STATE BANKS. *See* FEDERAL RESERVE BANKS.
COOPERATIVE BANKS, MASS. *See* CREDIT UNIONS.

JOINT-STOCK LAND BANKS. *See* FEDERAL FARM LOAN ACT, 4.

SECURITY FOR POSTAL DEPOSITS. *See* POSTAL SAVINGS SYSTEM.

STATE BANKS JOINING FEDERAL RESERVE SYSTEM. *See* FEDERAL RESERVE SYSTEM.

BEER. *See* LIQUORS, 1, 2, 3, 4, 5, 6, 7, 8.

BEVERAGES.

CONTAINING ONE AND ONE-HALF PER CENT ALCOHOL.

BOARD OF GENERAL APPRAISERS. *See* CUSTOMS SERVICE, 1, 2.

BONDS.

See LIQUORS, 1, 2, 3, 4, 7, 22.

CANCELLATION ON WAREHOUSE BONDS. *See* CUSTOMS LAWS, 1, 2, 3, 4.

LEGALITY OF ISSUE. *See* PHILIPPINE ISLANDS, 2; PORTO RICO, 1, 2, 3.

BULLION, IMPORTED. *See* CUSTOMS LAWS, 4.

BUMPING LAKE. *See* PUBLIC LANDS, 2.

BUREAU CHIEFS.

NAVAL OFFICERS SERVING AS BUREAU CHIEFS. *See* NAVY, 15, 16, 17, 18.

CANAL ZONE.

1. Expropriation of Lands in Canal Zone.—Lands situated in the Canal Zone and expropriated by this Government, in pursuance of the Executive order of December 5, 1912, should be paid for according to the value they had prior to the date of our convention with Panama, and not according to their value at some other subsequent date. 44.
2. Same.—The expressions of opinion of the Attorney General contained in his letter of October 13, 1913, to the Secretary of War, were intended to be confined to the point specifically stated, i. e., to the question of improvements made by occupants of land in the Canal Zone since the date of our treaty with Panama. 44.
3. Wages of Canal Zone Employees.—It would be legal for the Panama Canal authorities to revise the scale of wages in effect on the Isthmus so that the same should be based on the wages of civilian employees of the naval establishments in the continental United States after the latter have received the benefit of the increases provided in the naval appropriation act of March 4, 1917 (39 Stat. 1195). 138.

CASUALTY INSURANCE.

TAX ON POLICIES. *See* TAXATION, 1.

CATTLE, COTTONSEED CAKE FOR. *See* FOOD AND FUEL ACT. CENSUS.

APPOINTMENT OF SUPERVISORS. *See* CIVIL SERVICE, 1.

CEREALS.

BUYING, SELLING, ETC. *See* FOOD ADMINISTRATION GRAIN CORPORATION.

CERTIFICATES OF INDEBTEDNESS.

PHILIPPINE GOVERNMENT. *See* PHILIPPINE ISLANDS, 1.

CESSIONS OF STATE LANDS. *See* JURISDICTION, 1, 2, 3, 4, 5, 6.**CHECKS.**

CHARGES FOR COLLECTION, ETC. *See* FEDERAL RESERVE BANKS.

CHIPPEWA INDIANS.

Disposition of Moneys from Sale of Timber.—Until the appraisal provided for in section 2 of the act of May 23, 1908 (35 Stat. 270), all moneys received from the sale of all the timber from any of the lands within the Minnesota National Forest are required to be placed to the credit of the Chippewa Indians of Minnesota. 95.

CHROME.

ADJUSTMENT OF LOSS IN PRODUCTION. *See* MANGANESE.

CIDER. *See* LIQUORS, 9, 10, 11, 12, 22.**CIGARETTES.**

EXPORTED FOR DESTRUCTION. *See* CUSTOMS LAWS, 5.

CIVIL SERVICE.

1. Appointment of Supervisors of the Census.—Under the act to provide for the fourteenth and subsequent decennial censuses (40 Stat. 1291), the appointment of the supervisors is not subject to the civil-service act and rules. 467.
2. Employees of Railroad Administration.—Persons employed by the Director General of Railroads in connection with the Federal control of railroads need not be appointed in accordance with the civil-service act and rules. 530.
3. Erroneous Certification.—Where a resident of Oregon wholly without fault on his part, was examined in Washington, D. C., and appointed to a position in the apportioned service after certification was inadvertently made by the Civil Service Commission, the disregard of the restriction as to place of examination, contained in the first proviso in section 7 of the act of July 2, 1909 (36 Stat. 3), was cured and the appointee should not now be removed from the service. 110.
4. Members of Same Family—Eligibility to Appointment.—The appointment of a person to a position in the classified service, who at the time of appointment has two members of

CIVIL SERVICE—Continued.

her family in the service, one of whom entered it since her examination, is in violation of section 9 of the civil-service act of January 16, 1883 (22 Stat. 406), and this ineligibility to appointment is not cured by the appointing officer having inadvertently overlooked the statement in the "Declaration of appointee" that a second member of the family had entered the service subsequent to the date of her application for examination. 324.

5. **Same.**—Where there are already two members of the same family in the classified service, the removal of residence of another member of the family after appointment for the purpose of evading the disability imposed by section 9 of the civil-service act will not validate the appointment. 324.
6. **Preference in Appointments—Soldiers, Sailors, and Marines, and Their Widows.**—In so far as the provision of section 6 of the census act of March 3, 1919, which grants a preference in appointments to "honorably discharged soldiers, sailors, and marines, and the widows of such," relates to the executive departments, it affects only such appointments as shall be made for service at the seat of Government or in the so-called field forces of executive departments which operate away from Washington but under immediate and direct orders therefrom, and not out of some local office or branch of the Government, such as a local post office, customhouse, or office of an internal-revenue collector; and as to independent governmental establishments, this provision applies to all positions in all offices under the control of such establishments wherever located. 406.
7. **Same.**—Section 1754 of the Revised Statutes gives a preference in the matter of appointment to civil offices to persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty without regard to where these offices may be located, and while this section is more restricted than section 6 of the census act as to the persons in whose favor a preference is given, there is no conflict in so far as these provisions apply to the same appointments and the one does not give preference over the other. 407.
8. **Same.**—As there is nothing in the census act to indicate a purpose to adopt and make permanent the rules and regulations previously in force relating to section 1754 of the Revised Statutes and to apply them under that act, the matter of making proper rules and regulations is left to

CIVIL SERVICE—Continued.

the administrative officials, who may adopt those now in force or promulgate new ones as they may deem proper. 407.

9. **Reinstatement of Former Government Employees Who Entered the Military Service.**—The provision of the act of February 25, 1919 (40 Stat. 1164), which authorizes the reinstatement of former Government employees who have been drafted or enlisted in the military service of the United States in the war with Germany, is not limited to former employees of the War Department, but applies alike to former employees in any department of the Government. 452.
10. **Same.**—The provision includes all who were either drafted or who enlisted as privates, although they may have subsequently been commissioned as officers, and it also includes those who enlisted for the purpose of entering the officers' training camps and who were afterward commissioned, but it does not include those who were commissioned from civil life and without having previously enlisted for any purpose. 452.
11. **Same.**—The provision, *supra*, applies to former employees who entered the naval service or the Marine Corps as well as to those who entered the Army. 452.
12. **Same.**—The provision applies only to those who were drafted while in the employ of the Government or who left Government employment for the purpose of enlisting. 452.
13. **Same.**—The provision of the act of February 25, 1919 (40 Stat. 1164), which authorizes the reinstatement of former Government employees who have been drafted or enlisted in the military service of the United States in the war with Germany, does not apply to persons who were commissioned from civil life, without having previously enlisted for any purpose. 454.
14. **Same.**—The provision, *supra*, requires the restoration of every former Government employee to the civil-service status he occupied before he entered the military service, but if the position the employee left was only a temporary one and has actually ceased to exist, his right to reinstatement is lost. 454.
15. **Same.**—The provision requires that a former Government employee be reinstated in his former position if it exists, and this requirement is not satisfied by reinstating in a non-statutory position one who vacated a statutory position, although the rate of pay and civil-service designation are the same in both. 454.
16. **Same.**—The provision does not require that a former Government employee be reinstated if services of the character he

CIVIL SERVICE—Continued.

is able to perform are no longer needed, but if such services are required, he must be reinstated, although they are already being satisfactorily performed by another employee. 454.

17. *Same.*—The provision of the act of February 25, 1919 (40 Stat. 1164), which authorizes the reinstatement of former Government employees who have been drafted or enlisted in the military service of the United States in the war with Germany, applies to an employee who held a temporary appointment and who had no permanent civil-service status at the time he entered such service. Upon reinstatement, he will occupy the same civil-service status that he occupied at the time he entered the military service. 449.

18. *Same.*—Under the above provision, a Government employee, who was inducted into the military service and who thereafter was honorably discharged from such service, is entitled to be reinstated if he is qualified to perform the duties of his former position, and he is not deprived of his right to reinstatement by the fact that two members of his family are already in the classified service. 449.

19. *Reopening Examinations to Veterans.*—The proviso of section 6 of the census act of March 3, 1919 (40 Stat. 1293), gives to "honorably discharged soldiers, sailors, and marines, and widows of such," a preference in appointments from among those duly qualified, but this proviso does not relate to the examination of a candidate, which is a preliminary step to his qualification for a civil-service appointment. 489.

20. *Same.*—The Civil Service Commission may, in the exercise of its general power of control over examinations, find that the interests of good administration require special treatment in the reopening of examinations for those who were unable to compete in the original examinations because of their absence upon military or naval service, and, if the commission should so find, such examinations may be reopened to veterans only. 489.

21. *Reorganization of Customs Service.*—The President is not authorized to change the functions and personnel of the Board of General Appraisers; nor can he place in the classified civil service Board of General Appraisers and collectors of customs, appraisers, surveyors, naval officers, and assistant appraisers. 578.

ARMY FIELD CLERKS. *See* ARMY, 4.

CLAIMS AGAINST UNITED STATES.

PROSECUTION OF CLAIMS BY ARMY OFFICERS. *See* ARMY, 2, 3.

RELIEF IN CONTRACT CASES. *See* CONTRACTS, 5; MANGANESE.

CLAYTON ACT.

INTERLOCKING DIRECTORATES. *See* FEDERAL RESERVE SYSTEM.

COLLEGE POINT, N. Y. *See* NATIONAL BANKS, 1.

COMMERCE.

EXCISE TAX ON SALES IN FOREIGN COMMERCE. *See* TAXATION, 6.
COMMERCE, DEPARTMENT OF.

INDUSTRIAL BOARD'S PLAN TO STABILIZE PRICES. *See* ANTI-TRUST LAWS, 2.

COMMERCE AND LABOR, DEPARTMENT OF.

TRANSFER OF FUNCTIONS. *See* CUSTOMS SERVICE, 3.

COMMISSIONS.

ISSUED TO OFFICERS SERVING AS BUREAU CHIEFS. *See* NAVY, 15, 16, 17.

COMPENSATION. *See* ALIEN PROPERTY CUSTODIAN, 1; FEDERAL EMPLOYEES' COMPENSATION ACT; NAVY, 15; SALARIES; WATER-COURSES.

COMPROMISE OF PENALTIES. *See* INCOME TAX, 1.

CONSTITUTIONAL LAW. *See* FEDERAL FARM LOAN ACT, 1; INCOME TAX, 12, 13.

CONTRACTS.

1. **Government Contracts—Overtime Pay for Laborers and Mechanics.**—The provision of the naval appropriation act of March 4, 1917 (39 Stat. 1192), relating to overtime pay for work in excess of eight hours, applies to laborers and mechanics engaged upon work covered by contracts with the United States. 144.
2. **Same.—Signing Oath of Disinterestedness and Filing Return.**—In making the return of a contract on behalf of the Government, as provided for in sections 3744 and 3745 of the Revised Statutes, if the officer who personally makes the contract himself makes the oath of disinterestedness and files the return in the returns office of the Department of the Interior (assuming that the officer manually signing the contract is the officer who makes it in the sense of being responsible for its terms) the letter and spirit of the law are satisfied. 336.
3. **Same.—Ordinance Material.**—A provision in a contract for furnishing ordinance material, which authorizes an allowance of plus or minus 5 per cent of the articles ordered, does not foreclose the Government from insisting upon delivery of the full amount specified by the contract, nor does it enable the contractor to force acceptance of a greater amount. 537.
4. **Same.—Where the contract contains no such plus or minus clause,** the Government can not be compelled to accept a greater quantity, but if it accepts and uses a greater quantity it should be required to pay for the same. 537.

CONTRACTS—Continued.

5. *Same.*—The contract under consideration authorizes an allowance for overproduction and provides that disputes arising as to the meaning of anything in said contract shall be referred to Chief of Ordnance for determination; but claims arising under contracts which contain no authority for allowance for overproduction, and which therefore can not be allowed under such contracts, must be dealt with under the act of March 2, 1919, providing relief in cases of contracts connected with the prosecution of the war. 537.
6. *Sale of Farm Loan Bonds.*—The proposed contract between the Federal Farm Loan Board and certain investment houses, in stipulating that all issues of bonds of the Federal land banks for a period of six months from June 1, 1917, shall bear interest at the rate of $4\frac{1}{2}$ per cent, is not in conflict with the second subsection of section 12 of the Federal farm loan act (39 Stat. 370), which provides that farm land mortgages shall carry "a charge on the loan at a rate not exceeding the interest rate in the last series of farm loan bonds issued by the land bank making the loan." 122.
7. *Same.*—The provision of this contract to the effect that the bonds issued by the Federal land banks and not disposed of to the investment houses shall be sold by the issuing banks at the fixed price of $101\frac{1}{2}$ is within the purview of the powers conferred by the Federal farm loan act. 122.

AGREEMENT RELATING TO RADIO APPARATUS. *See* RADIO APPARATUS.

CLAIMS FOR RELIEF IN CONTRACT CASES. *See* MANGANESE.

FOR PURCHASE OF ALASKA NORTHERN RAILWAY. *See* ALASKA NORTHERN RAILWAY CO.

CORPORATIONS.

TAXATION. *See* INCOME TAX, 2, 3; TAXATION, 2.

COURT-MARTIAL. *See* NAVY, 1.

CREDIT UNIONS.

Income Tax.—Credit unions organized under the laws of the Commonwealth of Massachusetts, being in substance and in fact the same as "cooperative banks * * * organized and operated for mutual purposes and without profit," come within the provisions of the fourth paragraph of section 11 of the Federal income-tax act of September 8, 1916 (39 Stat. 766), as exempt from the requirements of said act. 176.

CRIMINAL LAWS.

RIGHT OF STATE TO ADMINISTER CRIMINAL LAWS ON CEDED TERRITORY. *See* JURISDICTION, 6.

CURRENCY, COMPTROLLER OF.

AUTHORITY TO APPOINT RECEIVERS. *See* RECEIVERS, 1, 2.

LEGALLY QUALIFIED MEMBER OF FEDERAL RESERVE BOARD.
See FEDERAL RESERVE BOARD, 2, 3.

CUSTOMS LAWS.

1. **Cancellation on Warehouse Bonds—Antimonial Lead.**—Antimonial lead, which is a combination of metals obtained from the smelting or refining process, is a "refined metal" within the meaning of section 29 of the tariff act of July 24, 1897 (30 Stat. 210), and might be exported and cancellations or credits had upon the warehouse bond in the ratio of the respective metals contained in the imported ore or bullion. 13.
2. **Same.**—Under the tariff act of July 24, 1897, the withdrawal by the American Smelting & Refining Co. of antimonial lead for ostensible export and its shipment abroad and return to the United States for the sole purpose of securing a reduction of duty upon it rendered the company liable for the difference between the amount paid as duty upon the metal when returned to this country (viz, 1½ cents on the lead contents) and the amount allowed as cancellation of the bonds upon withdrawal for the fraudulent export (viz, 2½ cents per pound). 13.
3. **Same.**—Under the tariff act of August 5, 1906 (36 Stat. 89), antimonial lead was entitled to withdrawal for domestic consumption upon the payment of a duty of 1½ cents per lead pound, and the same rate of cancellation upon the bond was allowed when such metal was withdrawn for export; and hence the company is not liable for the difference between the cancellation of 2½ cents per gross pound, erroneously made upon the bond, and the 1½ cents per lead pound paid upon reintroduction. 13.
4. **Same.—Imported Bullion.**—Under section 29 of the tariff act of July 24, 1897 (30 Stat. 210), providing for cancellation on warehouse bonds upon the exportation of 90 per cent of the refined metal produced from the imported bullion, it was incumbent upon the refining company to ascertain, set aside, and export the metals in the exact proportions in which they were contained in the bullion; and refined metal, neither derived from the bullion imported nor set aside in the representative proportions of the metal contents of such bullion, can not constitute any portion of the 90 per cent export required for cancellation on its bond. 29.
5. **Drawback on Cigarettes Sent Abroad for Destruction.**—A drawback is not allowable under paragraph 0, section 4, of the tariff act of October 3, 1913 (38 Stat. 200), on cigarettes manufactured in the United States from imported Turkish tobacco for domestic trade, and which have been recalled from domestic trade, after having become deteriorated or unsalable, and then shipped abroad, not for use in the commerce of any foreign country, but for the purpose of destruction. 1.

CUSTOMS LAWS—Continued.

6. **Same.**—The sending of goods out of this country merely for the purpose of destruction does not constitute an "exportation" within the intent of the drawback provision of the statute in question. 1.
7. **Drawback on Diamond Necklace.**—Drawback should be allowed upon the exportation of a certain diamond necklace manufactured in the United States with the use of 22 imported diamonds, under section 4, paragraph O, of the tariff act of October 3, 1913 (38 Stat. 200). 92.
8. **Entry for Consumption and Warehouse of Merchandise.**—William A. Brown & Co., or its duly authorized agent, is entitled to make entry for consumption and warehouse of certain imported merchandise which has remained unclaimed in general-order warehouse for more than one year but has not been sold by the collector, and after payment of all charges and duties found to be due, will then become entitled to all the rights and privileges accorded importers in regard to the exportation of merchandise, with a right of drawback, as provided by article 836, et seq., of the Customs Regulations of 1915. 284.
9. **Potash mined in Germany.**—Discriminatory Export Duty.—Whether the tax imposed by the German potassium salts law of May 10, 1910 upon potash shipped into this country is discriminatory export duty within the meaning of section 2 of the tariff act of August 5, 1909 (36 Stat. 82), is a question of fact that must be determined by the President; and, in determining whether such tax is discriminatory, the President should consider all the attendant facts and circumstances. 545.
10. **Refund of Excessive Drawback on Imported Pig Iron.**—Upon the facts submitted by the Treasury Department, a suit will lie against the International Harvester Co. to recover the excessive drawback paid on pig iron imported to be used in the manufacture of agricultural implements for export, and such suit may properly be brought for the full amount of the drawback paid to the Harvester company. 601.
11. **Same.**—Whether such a suit is advisable under all the circumstances of the case is a question to be determined by the Secretary of the Treasury in the first instance in the exercise of administrative discretion. 601.

CUSTOMS SERVICE.

1. **Reorganization.**—Under the provisions of the act of August 24, 1912 (37 Stat. 434), relating to the reorganization of the customs service, the President is authorized to abolish positions such as those of naval officers, surveyors, appraisers, and assistant appraisers; to dispense with their statutory functions; to transfer the auditing functions of

CUSTOMS SERVICE—Continued.

- the naval officer to a deputy auditor for the Treasury Department or to a deputy collector of customs; to consolidate certain customs positions; to abolish the fee system and place all officers on a flat salary basis; to abolish the authority of collectors to sell blank manifests, etc.; and to require a protest fee for the lodging of protests before the Board of General Appraisers or a similar board. 577.
2. Same.—The President is not authorized to change the functions and personnel of the Board of General Appraisers; nor can he place in the classified civil service the Board of General Appraisers and collectors of customs, appraisers, surveyors, naval officers, and assistant appraisers. 578.
 3. Same.—The President is authorized to transfer or consolidate with the Bureau of Customs the functions now exercised by the Customs Division of the Treasury Department, by the Division of Special Agents of the Treasury Department, and such of the functions of the Appointment Division of the Treasury Department as pertain to customs matters; but he is unauthorized to transfer to the Bureau of Customs certain functions pertaining to imports and exports now exercised by the Bureau of Statistics of the Department of commerce and Labor and he can not transfer to the Department of Commerce and Labor functions exercised by customs officers in enforcing the navigation laws. 578.
 4. Same.—The President may, within certain limits, increase the functions of the employees of the Customs Division, the special agents force, and the Appointment Division, and he may also increase the number of such employees other than the special agents. 578.
 5. Same.—Reduction of the cost of collecting the customs revenue to the maximum prescribed by the above act is not a condition precedent, in a legal sense, to the taking effect of the reorganization. 578.
 6. Same.—The scheme of reorganization to be submitted to Congress need not show in detail the estimated items of reductions in expenditure, though it should contain some general estimate as to that matter. 578.
 7. Same.—The transfer of the auditing functions of the naval officer to a deputy auditor for the Treasury Department does not authorize the President to omit from the estimates for collecting customs revenue the expenses of such auditing work. 578.

DECORATIONS OF HONOR.

ACCEPTANCE BY NAVAL OFFICERS. *See* NAVY, 7, 8.

DEPENDENTS. *See* WAR RISK INSURANCE, 5.

DESERTION. *See* NAVY, 2, 3, 4.

DIAMOND NECKLACE. *See* CUSTOMS LAWS, 7.

DIES.

LEASING FOR COMMERCIAL USE. *See* TRACTORS.

DISABILITY IMPOSED BY CIVIL-SERVICE ACT. *See* CIVIL SERVICE, 5.

DISTILLED SPIRITS.

1. Disposition of Distilled Spirits and Wines Illegally Imported.—Spirits brought into the United States in violation of certain acts of Congress herein cited (sec. 15 of the food-control act of Aug. 10, 1917, 40 Stat. 282; sec. 301 of the war revenue act of Oct. 3, 1917, 40 Stat. 308; and sec. 1 of the act of Nov. 21, 1918, 40 Stat. 1047) may be seized and forfeited under section 3082 of the Revised Statutes. 392.
2. Importation of Distilled Spirits.—The food control act of August 10, 1917 (40 Stat. 282), prohibits the importation for any purpose of distilled spirits produced prior to the passage of the war revenue act of October 3, 1917 (40 Stat. 300, 308). 180.
3. Same.—Distilled spirits produced after the passage of the war revenue act may be imported for other than beverage purposes under such rules, regulations, and bonds as the Secretary of the Treasury may prescribe. 180.
4. Same.—Distilled spirits produced in the West Indian Islands recently acquired from Denmark, if produced from products the growth of those islands and produced after the passage of the war revenue act, may be imported for any purpose, but if produced before the passage of the war revenue act their importation for any purpose is prohibited. 180.
5. Same.—Wines, including vermouth and ginger cordial, though fortified with distilled spirits, are not, within the meaning of the food-control act of August 10, 1917, and the war revenue act of October 3, 1917, *distilled spirits* if they do not contain more than 24 per cent absolute alcohol by volume, and their importation is therefore not prohibited. 236.
6. Tax on Distilled Spirits.—Distilled spirits held by manufacturers and intended not for sale as spirits but for manufacture into nonbeverage products are not subject to taxation under section 303 of the war revenue act of October 3, 1917 (40 Stat. 300). 194.

See also LIQUORS.

DISTILLERIES. *See* FRUIT DISTILLERIES.

DISTRICT ATTORNEY, UNITED STATES. *See* FEDERAL EMPLOYEES' COMPENSATION ACT, 1.

DIVIDENDS.

INCOME TAX ON STOCK DIVIDENDS *See* INCOME TAX, 14, 15.

"DOLLAR A YEAR" SALARY. *See* SALARIES, 1.

DONATIONS BY CORPORATIONS TO CHARITIES. *See* INCOME TAX, 2.

DRAFT ACT. *See* SELECTIVE SERVICE ACT.

DRAWBACK. *See* CUSTOMS LAWS, 5, 6, 7, 10, 11.

DUTIES. *See* CUSTOMS LAWS.

EIGHT-HOUR LAW. *See* CONTRACTS, 1.

EMERGENCY FLEET CORPORATION. *See* FEDERAL EMPLOYEES' COMPENSATION ACT, 3.

EMPLOYEES.

CANAL ZONE. *See* SALARIES, 2.

COMPENSATION FOR INJURIES. *See* FEDERAL EMPLOYEES' COMPENSATION ACT.

INCOME TAX, STATE EMPLOYEES. *See* INCOME TAX, 11.

PANAMA CANAL. *See* SALARIES, 3.

RAILROAD ADMINISTRATION. *See* CIVIL SERVICE, 2.

REINSTATEMENT OF FORMER GOVERNMENT EMPLOYEES. *See* CIVIL SERVICE, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18.

EMPLOYEES' COMPENSATION ACT. *See* FEDERAL EMPLOYEES' COMPENSATION ACT.

EMPLOYEES' COMPENSATION COMMISSION. *See* RAILROADS.

ENEMY-OWNED PATENT. *See* PATENTS, 3, 4.

ENEMY PROPERTY. *See* ALIEN PROPERTY CUSTODIAN.

ENEMY TRUSTS. *See* ALIEN PROPERTY CUSTODIAN, 1.

ENTRY FOR CONSUMPTION AND WAREHOUSE OF IMPORTED GOODS. *See* CUSTOMS LAWS, 8.

ESTATE TAX.

1. Real estate, as such, located outside of the United States, belonging to a decedent resident within the United States, should not be included in determining the value of the gross estate of such decedent for the purposes of the tax imposed by Title II of the revenue act of September 8, 1916 (39 Stat. 777). 287.
2. Value of Net Estate.—Under the estate tax provisions of the revenue act of September 8, 1916 (39 Stat. 777), the Government has no authority to require the inclusion in the gross estate, for the purpose of determining the net estate, of income earned during administration and appreciation during that period in the value of the property left by the decedent. 64.

EXAMINATIONS. *See* CIVIL SERVICE, 3.

EXCISE TAX. *See* TAXATION, 3.

EXECUTIVE DEPARTMENTS. *See* CIVIL SERVICE, 6, 7, 8, 16.

EXECUTORS.

NATIONAL BANKS AS EXECUTORS. *See* FEDERAL RESERVE BOARD, 1.

EXPORTATION. *See* CUSTOMS LAWS, 1, 2, 3, 4, 6, 8; LIQUORS, 15.

FARM LOAN BOARD. *See* FEDERAL FARM LOAN ACT, 2, 6.

FARM LOAN BONDS. *See* FEDERAL FARM LOAN ACT, 1, 2, 3, 7.

FARM LOAN COMMISSIONER.

USE OF FACSIMILE SIGNATURE. *See* SIGNATURE, 3.

FEDERAL AID ROAD ACT. *See* POSTAL SERVICE, 2.

FEDERAL EMPLOYEES.

REINSTATEMENT OF THOSE INDUCTED INTO MILITARY SERVICE.

See CIVIL SERVICE, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18.

FEDERAL EMPLOYEES' COMPENSATION ACT.

1. Assistant United States Attorney.—An assistant United States district attorney is not an employee of the United States within the meaning of the Federal employees' compensation act of September 7, 1916 (39 Stat. 742). 201.
2. Dr. von Esderf, a surgeon in the Public Health Service, having been appointed by the President by and with the advice and consent of the Senate, was an officer of the United States, and therefore not within the operation of the Federal employees' compensation act of September 7, 1916 (39 Stat. 742), which provides "compensation for employees of the United States suffering injuries while in the performance of their duties." 184.
3. Under section 32 of the Federal workmen's compensation act of September 7, 1916 (39 Stat. 749), the United States Employees' Compensation Commission has power, when the question is properly presented, to decide whether employees of the United States Shipping Board Emergency Fleet Corporation, or other persons, are entitled to the benefits of the provisions of said act. 252.

FEDERAL FARM LOAN ACT.

1. First mortgages.—Exemption from Taxation.—That portion of section 26 of the Federal farm loan act of July 17, 1916 (39 Stat. 380), which exempts first mortgages executed to Federal land banks and farm loan bonds from State, municipal, and local taxation, is constitutional. 108.
2. Sale of Farm Loan Bonds.—The proposed contract between the Federal Farm Loan Board and certain investment houses, in stipulating that all issues of bonds of the Federal land banks for a period of six months from June 1, 1917, shall bear interest at the rate of 4½ per cent, is not in conflict with the second subsection of section 12 of the Federal farm loan act (39 Stat. 370), which provides that farm land mortgages shall carry "a charge on the loan at a rate not exceeding the interest rate in the last series of farm loan bonds issued by the land bank making the loan." 122.
3. Same.—The provision of this contract to the effect that the bonds issued by the Federal land banks and not disposed of to the investment houses shall be sold by the issuing banks at the fixed price of 101½ is within the purview of the powers conferred by the Federal farm loan act. 122.
4. Joint-Stock Land Banks—Loans to Corporations.—Under the Federal farm loan act of July 17, 1916 (39 Stat. 360), Joint-

FEDERAL FARM LOAN ACT—Continued.

stock land banks are not permitted to make loans either through national farm loan associations or through agents, except to natural persons, and can not therefore lend to corporations. 494.

5. **Loans by Federal Land Banks—North Dakota Seed and Feed Bonding Act.**—Under the provisions of the Federal farm loan act (39 Stat. 360), a Federal land bank has authority to make a loan secured by a first mortgage on farm land in North Dakota if at the date when the mortgage is executed there is no other actual lien or encumbrance then in existence, notwithstanding the seed and feed bonding act of North Dakota creates as to all farm lands in the State a potentiality of encumbrances for seed grain and feed which may displace the lien of a first mortgage. 605.
6. **Same.**—It clearly lies within the discretion of the Farm Loan Board, however, to refuse to approve such classes of first liens on farm lands as it may deem undesirable security for loans by reason of the potentiality of accrual of liens under the statute in question or otherwise. 605.
7. **Signing Attached Certificate to Farm Loan Bonds.**—Under the provision in section 21 of the Federal farm loan act of July 17, 1916 (39 Stat. 377), which requires every farm loan bond to contain a certificate signed by the Farm Loan Commissioner, the certificate may be signed by an engraved facsimile signature of the Farm Loan Commissioner. 146.

FEDERAL FARM LOAN BOARD. *See* FEDERAL FARM LOAN ACT.

2, 6.

FEDERAL FARM LOAN BONDS. *See* FEDERAL FARM LOAN ACT, 1, 2, 3, 7.

FEDERAL INCOME TAX. *See* INCOME TAX, 3.

FEDERAL JUDGES.

SALARIES. *See* INCOME TAX, 12, 13.

FEDERAL LAND BANKS. *See* FEDERAL FARM LOAN ACT, 1, 2, 3, 4, 5.

FEDERAL RESERVE ACT. *See* FEDERAL RESERVE BANKS.

FEDERAL RESERVE BANKS.

Charges for the Collection and Payment of Checks—The limitations contained in section 13 of the Federal reserve act, as amended, relating to charges for the collection and payment of checks, do not apply to State banks not connected with the Federal reserve system as members or depositors. Checks on banks making such charges can not, however, be cleared or collected through Federal reserve banks. 245.

FEDERAL RESERVE BOARD.

1. **National Banks—Fiduciary Permits.**—The Federal Reserve Board has no authority to grant to national banks located in New York the power to act as trustee, executor, and administrator. 186.
2. **Status of Mr. Williams as Member of Federal Reserve Board.**—Mr. John Skelton Williams, whose nomination for reappointment was not acted upon by the Senate prior to its adjournment, has continued to exercise the duties of the office of Comptroller of the Currency since the expiration of his original term of office on January 19, 1919. Under such circumstances he remains Comptroller of the Currency *de jure*, and consequently is a legally qualified member of the Federal Reserve Board. 401.
3. **Same.**—Since Mr. Williams holds the office of Comptroller of the Currency *de jure*, it follows that he is entitled to receive the salary prescribed by section 10 of the Federal reserve act to be paid to the Comptroller of the Currency as *ex officio* member of the Federal Reserve Board. 401.

FEDERAL RESERVE SYSTEM.

State Banks Joining Federal Reserve System.—The restrictions relating to interlocking directorates imposed by section 8 of the Clayton Act of October 15, 1914 (38 Stat. 732), do not apply to State banks joining the Federal reserve system. 153.

FEDERAL TRADE COMMISSION.

AUTHORITY TO ISSUE LICENSES. See PATENTS, 1.

FEDERAL WORKMEN'S COMPENSATION ACT. See FEDERAL EMPLOYEES' COMPENSATION ACT, 3.

FEES.

CUSTOMS SERVICE. See CUSTOMS SERVICE, 1.

INCURRED IN SECURING ENEMY PROPERTY. See ALIEN PROPERTY CUSTODIAN, 1.

FIDUCIARY PERMITS. See FEDERAL RESERVE BOARD, 1.

FLEET MAIL CLERK. See NAVY, 5.

FLEET NAVAL RESERVE.

ELIGIBILITY TO MEMBERSHIP. See NAVY, 2.

FOOD ADMINISTRATION.

Sugar Refiners' Agreement with Food Administration.—A certain agreement negotiated by the United States Food Administration with the leading refiners of sugar in the United States which provides that until December 31, 1919, the refiners shall purchase their entire requirements of raw sugar from the United States Sugar Equalization Board (Inc.) (an agency of the Food Administration), and that during such period the refiners shall observe a fixed maximum price on all sugar manufactured by them, is author-

FOOD ADMINISTRATION—Continued.

ized by the food-control act and is not prohibited by the Sherman Antitrust Act. 376.

FOOD ADMINISTRATION GRAIN CORPORATION.

The Food Administration Grain Corporation, as an authorized agent of the President, may lawfully extend its operations to include the buying, selling, and storing of rye, barley, oats, rice, corn, and other cereals, in order to coordinate the flow of such commodities to seaboard over our railways and to assure the civil population of our own country as well as the Allies a sufficient amount thereof, and to provide sufficient distribution for the Army and Navy of the United States and the Allies. 344.

FOOD ADMINISTRATOR.

REQUISITION OF COTTONSEED CAKE. *See* FOOD AND FUEL ACT.

FOOD AND DRUGS ACT.

Single-wrapped Hams.—Single hams and single sides of bacon wrapped or covered with paper, cloth, or gelatine are not "in package form" within the meaning of the net weight amendment to the food and drugs act. 150.

FOOD AND FUEL ACT.

Requisition of Cottonseed Cake.—Under the provision of section 10 of the food and fuel act of August 10, 1917 (40 Stat. 279), the President has the power, acting through the Food Administrator, to requisition cottonseed cake to be used to preserve the cattle herds of Texas and insure a proper meat supply for the country. 198.

FOOD-CONTROL ACT. *See* FOOD AND FUEL ACT; LIQUORS, 13, 18, 21.

FOOD PRODUCTS.

USE IN MANUFACTURE OF LIQUORS. *See* LIQUORS, 1, 2, 12.

FOODSTUFFS.

BUYING, SELLING, ETC. *See* FOOD ADMINISTRATION GRAIN CORPORATION.

FORT D. A. RUSSELL TARGET AND MANEUVER RESERVATION.

See PUBLIC LANDS, 5, 6.

FOREST RESERVES. *See* NATIONAL FORESTS.

FORFEITURE OF LIQUOR. *See* LIQUORS, 13, 14, 16, 17.

FREIGHT, INTERSTATE. *See* TAXATION, 7, 8.

FRUIT DISTILLERIES.

Installation of Meters.—Under section 402, paragraph g, of the revenue act of September 8, 1916 (39 Stat. 787), the Commissioner of Internal Revenue is authorized, by proper rules and regulations, to be approved by the Secretary of the Treasury, to adopt and prescribe for use at fruit distilleries meters, locks, and seals, to be purchased at the expense of the distiller, before such distiller may legally engage in the business of manufacturing distilled spirits from fruits. 115.

FRUIT JUICES. *See* LIQUORS, 22.

GAUGES.

LEASING FOR COMMERCIAL USE. *See* TRACTORS.

GEOLOGICAL SURVEY.

APPOINTMENT OF FIELD REPRESENTATIVE AT \$1 PER YEAR. *See* SALARIES, 1.

GEORGIA.

CESSION OF STATE JURISDICTION. *See* JURISDICTION, 1.

GERMANY.

DISCRIMINATORY EXPORT DUTY ON GERMAN POTASH. *See* CUSTOMS LAWS, 9.

GINGER CORDIAL.

IMPORTATION. *See* LIQUORS, 21.

GOVERNMENT.

CONTRACTS. *See* CONTRACTS, 1, 2, 3, 4.

EMPLOYEES. *See* CIVIL SERVICE, 9, 10, 11, 14, 15, 16, 17, 18;

FEDERAL EMPLOYEES' COMPENSATION ACT.

OFFICIALS, SALARIES. *See* SALARIES, 1.

VALUE OF NET ESTATE. *See* ESTATE TAX, 2.

GOVERNMENT HOSPITAL FOR THE INSANE.

Name changed to "St. Elizabeths Hospital" by the act of July 1, 1916 (39 Stat. 309). 432.

GRATUITY LAWS REPEALED. *See* WAR RISK INSURANCE, 5.

GROSS ESTATE. *See* ESTATE TAX, 2.

GUANO ISLANDS ACT.

SOVEREIGNTY OF UNITED STATES. *See* SWAN ISLANDS.

HAWAII.

NATIONAL BANK AT SCHOFIELD BARRACKS. *See* NATIONAL BANKS, 3.

HOULTON GRANGE ASSOCIATION. *See* INCOME TAX, 6, 7.

ILLINOIS.

CESSION OF STATE JURISDICTION. *See* JURISDICTION, 2.

ILOILO, P. I.

LEGALITY OF BOND ISSUE. *See* PHILIPPINE ISLANDS, 2.

IMPORTATION.

ALCOHOL. *See* PORTO RICO, 4, 5.

BULLION. *See* CUSTOMS LAWS, 1, 4.

CIDER. *See* LIQUORS, 10.

DISTILLED SPIRITS. *See* LIQUORS, 13, 14.

ILLEGALLY IMPORTED SPIRITS, FORFEITURE AND SALE. *See* LIQUORS, 14, 15.

LIQUORS CONTAINING ONE-HALF OF 1 PER CENT ALCOHOL. *See* LIQUORS, 22.

WINES, VERMUTH, AND GINGER CORDIAL. *See* LIQUORS, 21, 22.

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INCOME TAX.

1. **Compromise of Penalties Arising Under Income-Tax Laws.**—The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, is authorized to compromise claims for penalties imposed and interest charged against taxpayers for delinquencies under the income-tax laws in all cases where, in his judgment, such compromises are for the interest of the United States. 459.
2. **Corporations.—Contributions to Red Cross or Other War Activities.**—Corporations are not entitled to deduct from their gross income for the purposes of the income tax the amount of contributions made to religious, charitable, scientific, or educational corporations or associations, even though such contributions are made to the Red Cross or other war activities. 617.
3. **Same.—Returns of Income.**—The act of the State of New York (Laws, 1917, ch. 726), which imposes a franchise tax on manufacturing and mercantile corporations, does not impose "a general income tax" within the meaning of the proviso of the Federal income-tax act of September 8, 1916 (39 Stat. 772), authorizing proper State officers to have access to and abstracts of income returns of corporations. 148.
4. **Same.**—The Secretary of the Treasury is not authorized to grant the request of the governor of New York to have access to the returns of income made to the Federal Government or to abstracts thereof in so far as the request is based upon the aforesaid proviso of the act of September 8, 1916. 148.
5. **Credit Unions—Income Tax.**—Credit unions organized under the laws of the Commonwealth of Massachusetts, being in substance and in fact the same as "cooperative banks * * * organized and operated for mutual purposes and without profit," come within the provisions of the fourth paragraph of section 11 of the Federal income-tax act of September 8, 1916 (39 Stat. 766), as exempt from the requirements of said act. 176.
6. **Houlton Grange Association.**—An association known as "Houlton Grange," composed of persons engaged in agriculture, which acts as the agent of its members for the purchase of goods needed by them, reselling the goods to them at prices fixed by the association, is not exempt from the income tax imposed by the revenue act of September 8, 1916 (39 Stat. 765, 766), because it does not operate under the lodge system or provide for benefits to its members, and because it does not operate as sales agent for the purpose of marketing the products of its members. 408.

INCOME TAX—Continued.

7. **Same.**—As far as this tax is concerned, the association in question stands upon the same footing as any individual, partnership, or corporation whose business it is to buy and sell merchandise, and the tax is levied not upon the gross income but the net income. 404.
8. **Inventories—Dealers in Merchandise.**—An inventory taken by a manufacturer of, or dealer in merchandise at cost or market value, whichever is lower, is permitted by subdivision (g) of section 8 and by subdivision (d) of section 13 of the income-tax act of February 8, 1916 (39 Stat. 763, 771), subject, of course, to regulations made in accordance with said act. 301.
9. **Same.—Dealers in Securities.**—The same rule applies to a dealer or merchant in securities; and it is a matter for regulations issued by the Treasury Department under the authority of the aforesaid act to determine what constitutes a dealer or merchant in securities. 302.
10. **Proceeds of Accident Insurance Policy.**—The proceeds of an accident insurance policy received by an individual on account of personal injuries sustained by him through accident are not income taxable under the provisions of Title I of the act of September 8, 1916 (39 Stat. 757), as amended by Title XII of the act of October 3, 1917 (40 Stat. 329), and of Title I of the act of October 3, 1917 (40 Stat. 300). 304.
11. **Salaries and Wages of State Officials and Employees.**—The salaries and wages of State officials and employees are not subject to the income tax imposed by the revenue act of February 24, 1919 (40 Stat. 1057). 441.
12. **Salaries of President and Federal Judges.**—The salaries of the President of the United States and the judges of the Supreme and inferior courts of the United States are subject to the income tax imposed by the act of February 24, 1919 (40 Stat. 1057). 475.
13. **Same.**—The provision of said act (40 Stat. 1065) requiring the salaries of the President and the Federal judges to be included as a part of their gross incomes for the purposes of the income tax is valid and constitutional, as it does not diminish the compensation of these officials within the meaning of the constitutional inhibition. 475.
14. **Same.—Stock Dividends.**—As there is not a plain and obvious conflict between the provisions of the Constitution and the provisions of the income-tax acts of September 8, 1916 (39 Stat. 756, 757, 766), and of October 3, 1917 (40 Stat. 329, 337, 338), levying an income tax on stock dividends payable out of earnings accrued since March 1, 1913, it is the duty of the administrative officer to comply with the

INCOME TAX—Continued.

provisions of the statute, leaving the question of its constitutionality to be determined by the courts. 213.

15. *Same.*—The decision in *Towne v. Eisner* (245 U. S. 418) does not justify an administrative officer in setting aside and disregarding the present statute levying an income tax on stock dividends, since that decision does not in terms decide that Congress has not the power expressly to tax as income stock dividends of the character described in the present statute, although it did determine that the word "income" as used in the income-tax act of October 3, 1913, could not be taken to include stock dividends which had been declared from surplus profits earned prior to the taxing year and prior to the ratification of the sixteenth amendment to the Constitution. 213.

16. *Same.*—Tax on Liberty Loan Bonds.—Liberty loan bonds, issued under the act of April 24, 1917 (40 Stat. 35), are subject to income tax when received by a stockholder of a corporation in payment of a corporate dividend. 125.

INDUSTRIAL BOARD, COMMERCE DEPARTMENT.

PLAN TO STABILIZE PRICES. *See* ANTITRUST LAWS, 2.

INJURIES TO GOVERNMENT EMPLOYEES. *See* FEDERAL EMPLOYEES' COMPENSATION ACT.**INSANITY.**

JUDICIAL INQUIRY, DISTRICT OF COLUMBIA *See* ST. ELIZABETHS HOSPITAL, 3.

INSURANCE.

CONVERTED TERM INSURANCE. *See* WAR RISK INSURANCE, 3.

POLICIES UNDER PENNSYLVANIA WORKMEN'S COMPENSATION ACT. *See* TAXATION, 4, 5.

PROCEEDS OF ACCIDENT POLICY. *See* INCOME TAX, 10.

TAX ON CASUALTY POLICY FEES. *See* TAXATION, 1.

WAR RISK INSURANCE. *See* WAR RISK INSURANCE.

INTERIOR, SECRETARY OF.

AUTHORITY TO ADJUST LOSSES IN MANGANESE PRODUCTION.

See MANGANESE.

AUTHORITY TO PURCHASE ALASKA NORTHERN RAILWAY CO.

See ALASKA NORTHERN RAILWAY CO.

AUTHORITY TO SELL TIMBER. *See* NATIONAL FORESTS, 2, 3.

REQUESTING OPINION AS TO PENSIONS. *See* PENSIONS, 2.

INTERLOCKING DIRECTORATES.

STATE BANKS. *See* FEDERAL RESERVE SYSTEM.

INTERNAL REVENUE. *See* CUSTOMS LAWS.**INTERNAL REVENUE, COMMISSIONER OF.**

COMPROMISE OF PENALTIES UNDER INCOME-TAX LAWS. *See* INCOME TAX, 1.

INTERNATIONAL HARVESTER CO. *See* CUSTOMS LAWS, 10, 11.

INTERSTATE COMMERCE.

WAR TAX ON FREIGHT. *See* TAXATION, 7, 8.

INTOXICATING LIQUORS. *See* LIQUORS.

INVENTORIES BY DEALERS IN MERCHANDISE AND SECURITIES. *See* INCOME TAX, 8, 9.

IRRIGATION. *See* PUBLIC LANDS, 2.

JOINT-STOCK LAND BANKS. *See* FEDERAL FARM LOAN ACT, 4.

JUDGE ADVOCATE GENERAL.

RANK ON RETIREMENT OF NAVAL OFFICER SERVING AS. *See* NAVY, 18.

JUDGES.

SALARIES OF FEDERAL JUDGES. *See* INCOME TAX, 12, 13.

VIRGIN ISLANDS. *See* VIRGIN ISLANDS.

JURISDICTION.

1. Cession of State Jurisdiction—Georgia.—The reservation by the State of Georgia of its civil and criminal jurisdiction over persons and citizens in territory ceded to the United States for Federal building sites fails to meet the requirements of section 355 of the Revised Statutes. 282.
2. Same.—Illinois.—The reservation by the State of Illinois of the right to administer its criminal laws upon the lands acquired by the United States for Federal building sites does not comply with the requirements of section 355 of the Revised Statutes. 265.
3. Same.—The reservation of the right to serve and execute State process on territory ceded to the United States is premissible and not inconsistent with the exclusive Federal authority required by section 355 of the Revised Statutes. 265.
4. Same.—Kansas.—The reservation by the State in the Kansas law of concurrent jurisdiction over sites within the State acquired by the Federal Government for public buildings is incompatible with the consent required by section 355 of the Revised Statutes. 260.
5. Same.—Minnesota.—The reservation of the right to punish offenses against State laws committed on lands acquired for Federal building sites embraced in a cession act of Minnesota is incompatible with the exercise of the exclusive jurisdiction contemplated by section 355 of the Revised Statutes. 263.
6. Same.—Nevada.—The reservation by the State of Nevada of the right to administer its criminal laws upon the lands acquired by the United States for Federal building sites is incompatible with the consent required by section 355 of the Revised Statutes. 294.

NAVAL COURT-MARTIAL. *See* NAVY, 1.

KANSAS.

CESSION OF STATE JURISDICTION. *See* JURISDICTION, 4.
 LABORERS.

OVERTIME PAY. *See* CONTRACTS, 1.

LAND DEPARTMENT.

LIEU LANDS. *See* PUBLIC LANDS, 5, 6.

LANDS.

EXPROPRIATED. *See* CANAL ZONE, 1, 2.

CEDED BY STATES. *See* JURISDICTION.

LEASING FOR SUMMER RECREATION.

LANDS WITHDRAWN FOR IRRIGATION PURPOSES. *See* PUBLIC LANDS, 2.

LETTER BOXES. *See* POSTAL SERVICE, 1.

LIBERTY LOAN BONDS. *See* INCOME TAX, 16; TAXATION, 2.

LICENSES.

TO USE ENEMY-OWNED PATENTS. *See* PATENTS, 1, 2.

LIENS FOR SEED GRAIN, ETC. *See* FEDERAL FARM LOAN ACT, 5.

LIEU SELECTIONS CANCELED. *See* PUBLIC LANDS, 5, 6.

LIQUORS.

1. Beer.—Alcoholic Content.—Manufacture.—By the provision of the act of November 21, 1918 (40 Stat. 1046), prohibiting the use of food products in the manufacture of beer, it was not intended to include malt liquor which does not contain as much as one-half of 1 per cent of alcohol. 498.
2. Same.—The act, *supra*, prohibits the use of food products in the manufacture of all malt and vinous liquors for beverage purposes containing one-half of 1 per cent of alcohol. 498.
3. Same.—Whether the word "beer," as used in the above provision, includes ale, porter, stout, etc., depends upon whether these latter beverages are ordinarily classed as beer. This is a question of fact and can not be determined as a matter of law. 498.
4. Same.—A line of demarcation between intoxicating and non-intoxicating liquors, based upon whether they contain as much as or less than one-half of 1 per cent of alcohol, may be prescribed by the Secretary of the Treasury. 498.
5. Same.—Beer upon which the tax imposed by previously existing law had been paid, and which had been removed from Government custody prior to the passage of the revenue act of February 24, 1919, is not subject to the additional tax imposed by section 608 of the latter act (40 Stat. 1109). 615.
6. Same.—Taxation—Manufacture and Sale.—Where beer has been manufactured and withdrawn for sale in violation of the food-control act (40 Stat. 276), and the regulations thereunder, the tax imposed thereon by section 608 of the revenue act of February 24, 1919 (40 Stat. 1109), may be

LIQUORS—Continued.

- lawfully collected, and it is the duty of the proper officer to collect it, as the liability for this tax does not depend upon whether such manufacture and sale are legal or illegal. 442.
7. Same.—The tax imposed by section 608 of the revenue act, *supra*, should be collected on all beer containing one-half of 1 per cent, or more, of alcohol manufactured and sold after May 1, 1919. 442.
8. Same.—Sections 3340 and 3354 of the Revised Statutes authorize seizure and forfeiture proceedings only for violations of the revenue laws, and, if the revenue laws are complied with, these sections will not apply to cases of violation of either the food-control act or the act of November 21, 1918 (40 Stat. 1146). 442.
9. Cider—Taxation—Importation—Manufacture and Sale.—Under the act of February 24, 1919 (40 Stat. 1110, 1116), cider is subject to the wine tax when sold as wine, and is subject to the soft drink tax when sold not as wine but in bottles or other closed containers, but it is not otherwise subject to the internal-revenue laws. 491.
10. Same.—The provision of the act of November 21, 1918 (40 Stat. 1047), which prohibits the importation of all alcoholic liquors, includes cider if it contains enough alcohol to render it intoxicating. 491.
11. Same.—Cider is not a vinous liquor within the meaning of the act of November 21, 1918, and, regardless of its alcoholic content, the manufacture or sale thereof is not prohibited by that act. 491.
12. Same.—Since the act of November 21, 1918, does not prohibit the manufacture or sale of cider, it will not be necessary for agents of the Treasury Department to report to the Department of Justice instances of its manufacture or sale. 491.
13. Distilled Spirits and Wines Illegally Imported—Disposition.—Spirits brought into the United States in violation of certain acts of Congress herein cited (sec. 15 of the food-control act of Aug. 10, 1917, 40 Stat. 282; sec. 301 of the war revenue act of Oct. 3, 1917, 40 Stat. 308; and sec. 1 of the act of Nov. 21, 1918, 40 Stat. 1047) may be seized and forfeited under section 3082 of the Revised Statutes. 392.
14. Same.—When the value of such illegally imported spirits is not in excess of \$500, they may be forfeited and sold by the summary proceedings provided for in sections 3074 to 3077 of the Revised Statutes. 392.

LIQUORS—Continued.

15. Same.—Liquor brought into the United States in violation of the acts mentioned, *supra*, can not ordinarily be permitted to be exported; but where the importer brought in such liquor in good faith and in ignorance of such legislation, having immediately before making the shipments made inquiry of the United States consuls at foreign ports and being informed that there was no law prohibiting the importation thereof, such liquor may be permitted to be exported. 392.
16. Same.—When liquors are forfeited to the United States in a State where the sale of intoxicating liquors is prohibited by State laws, the sale of such liquors by the United States in such State would be lawful; but such liquors may also be shipped to and sold in a State where there are no such prohibitory laws; and to avoid embarrassment and seeming conflict with local laws this should always be done. 392.
17. Same.—Liquor entered in a bonded warehouse under Senate joint resolution of October 6, 1917 (40 Stat. 427), may be withdrawn for export for the full period of one year from the date of entry, not counting any time during which an order or proclamation of the President may have prevented its exportation; but such liquor can not be forfeited to the Government until it shall have been in the warehouse as long as three years, excluding any time when its exportation or transshipment shall have been prevented by an order of the President. 392.
18. Distilled Spirits—Importation.—The food-control act of August 10, 1917 (40 Stat. 282), prohibits the importation for any purpose of distilled spirits produced prior to the passage of the war revenue act of October 3, 1917 (40 Stat. 300, 308). 180.
19. Same.—Distilled spirits produced in the West Indian Islands recently acquired from Denmark, if produced from products the growth of those islands and produced after the passage of the war revenue act, may be imported for any purpose, but if produced before the passage of the war revenue act their importation for any purpose is prohibited. 180.
20. Same.—Distilled spirits produced after the passage of the war revenue act may be imported for other than beverage purposes under such rules, regulations, and bonds as the Secretary of the Treasury may prescribe. 180.
21. Same.—Wines, including vermouth and ginger cordial, though fortified with distilled spirits, are not, within the meaning of the food-control act of August 10, 1917, and the war revenue act of October 3, 1917, *distilled spirits* if they do not contain more than 24 per cent absolute alcohol by volume, and their importation is therefore not prohibited. 236.

LIQUORS—Continued.

22. Same.—The importation of vermouth, cider, fruit juices, and other beverages containing as much as one-half of 1 per cent of alcohol is prohibited by the said act of November 21, 1918. 498.

LOANS.

TO CORPORATIONS BY JOINT-STOCK LAND BANKS. *See* FEDERAL FARM LOAN ACT, 4.

UNDER FARM LOAN ACT. *See* FEDERAL FARM LOAN ACT, 2, 5, 8.

MACHINERY AND TOOLS.

TRANSFER FROM ONE NAVY YARD TO ANOTHER. *See* NAVY YARDS.

MANGANESE.

Adjustment of Losses Incurred in Producing Manganese., Etc., for the Government.—The provision in section 5 of the act of March 2, 1919 (40 Stat. 1274), which authorizes the adjustment of losses incurred in "producing or preparing to produce either manganese, chrome, pyrites, or tungsten in compliance with the request or demand" of certain designated governmental agencies, does not authorize the recognition of a claim based upon a general solicitation or appeal, but to come within the purview of this provision the claimant must have been asked specifically by one of these governmental agencies to produce or prepare to produce one or more of the named minerals. 496.

MANUFACTURERS' AIRCRAFT ASSOCIATION. *See* ANTITRUST LAWS, 1.

MARINE CORPS.

EXAMINATIONS REOPENED TO VETERANS. *See* CIVIL SERVICE, 19, 20.

PREFERENCE IN APPOINTMENT TO HONORABLY DISCHARGED MARINES, ETC. *See* CIVIL SERVICE, 6, 7, 8, 19, 20.

REINSTATEMENT UNDER CIVIL SERVICE OF FORMER GOVERNMENT EMPLOYEES IN MARINE CORPS. *See* CIVIL SERVICE, 11.

REPEAL OF GRATUITY LAWS. *See* WAR RISK INSURANCE, 5.

MECHANICS.

OVERTIME PAY. *See* CONTRACTS, 1.

MEDALS OF HONOR.

ACCEPTANCE BY NAVAL OFFICERS. *See* NAVY, 7, 8.

MILITARY DECORATIONS. *See* NAVY, 7, 8.

MILITARY RESERVATIONS. *See* PUBLIC LANDS, 5, 6.

MILITARY SERVICE.

ARMY FIELD CLERKS. *See* ARMY, 4.

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LIABILITY OF NEUTRAL DECLARANTS. *See* SELECTIVE SERVICE ACT.

MILITARY TRIBUNALS.

TRIAL OF SPIES. *See* SPIES.

MINERALS.

LOSSES IN PRODUCTION. *See* MANGANESE.

MINNESOTA.

CESSION OF STATE JURISDICTION. *See* JURISDICTION, 5.

MINNESOTA NATIONAL FOREST. *See* NATIONAL FORESTS, 1, 2, 3, 4.

MISBRANDED FOODS. *See* FOOD AND DRUGS ACT.

MISSISSIPPI RIVER. *See* WATERCOURSES.

MONEY.

MAINTENANCE OF PARITY BETWEEN SILVER AND GOLD PESOS.

See PHILIPPINE ISLANDS, 1.

MONEY BENEFITS.

JURISDICTION TO DETERMINE BENEFICIARIES. *See* PENSIONS, 1.

TO INMATES OF NAVAL HOME. *See* PENSIONS, 3, 4.

MORTGAGES.

EXEMPTION FROM TAXATION. *See* FEDERAL FARM LOAN ACT, 1.

FARM LANDS, NORTH DAKOTA. *See* FEDERAL FARM LOAN ACT, 5, 6.

NATIONAL BANKS.

1. College Point, N. Y.—A national bank can not be organized at College Point, Borough of Queens, N. Y., with a capital of \$100,000 consistently with the provisions of section 5138 of the Revised Statutes. 384.

2. New York.—The Federal Reserve Board has no authority to grant to national banks located in New York the power to act as trustee, executor, and administrator. 186.

3. Schofield Barracks.—A national bank can be chartered at Schofield Barracks, Territory of Hawaii, with a capital of \$100,000, consistently with the provisions of section 5138 of the Revised Statutes. 120.

FIDUCIARY PERMITS. *See* FEDERAL RESERVE BOARD, 1.

RECEIVER FOR UNION NATIONAL BANKS. *See* RECEIVERS, 1, 2.

NATIONAL FORESTS.

1. Minnesota National Forest.—The Secretary of Agriculture may sell any timber, whether standing or down, of species other than merchantable pine, on the Minnesota National Forest outside the 10 sections and the islands and points, in conformity with the general forestry laws and regulations. 95.

2. Same.—The Secretary of the Interior is authorized to sell all dead and down merchantable pine timber on these forestry lands outside the 10 sections, islands, and points and not selected by the Forester for reforestation while green and standing. 95.

3. Same.—Until the appraisal provided for in section 2 of the act of May 23, 1908 (35 Stat. 270), all moneys received

NATIONAL FORESTS—Continued.

from the sale of all the timber from any of the lands within the Minnesota National Forest are required to be placed to the credit of the Chippewa Indians of Minnesota. 95.

4. Same.—The sale of all merchantable pine timber which has been selected for reforestation, as well as all timber on the 10 sections, islands, and points, whether it be green or dead, standing or fallen, is under the jurisdiction of the Secretary of Agriculture. 95.

See also PUBLIC LANDS, 1, 7.

NAVAL COURT-MARTIAL. *See* NAVY, 1.

NAVAL HOME.

MONEY BENEFITS TO INMATES. *See* PENSIONS, 3, 4, 5.

NAVAL OFFICERS. *See* CUSTOMS SERVICE, 1, 7; NAVAL RESERVE FORCE; NAVY, 2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18.

NAVAL PENSIONS. *See* PENSIONS, 3, 4, 5.

NAVAL RESERVE FORCE.

Provisional Assignments.—Under the provisions of the act creating a Naval Reserve Force of August 29, 1916 (39 Stat. 587, 588), when an enrolled member in the Naval Reserve Force has been given a provisional rank, he may thereafter, either with or without being confirmed in such provisional rank, be given a higher provisional rank without examination by the statutory board of three naval officers of or above the rank of lieutenant commander and the statutory board of naval surgeons. 173.

NAVIGATION.

IMPROVEMENT OF MISSISSIPPI RIVER. *See* WATERCOURSES.

NAVIGATION BUREAU.

AFFIXING FACSIMILE SIGNATURE OF CHIEF TO ORDERS, ETC.
See SIGNATURE, 1, 2.

RANK OF OFFICER SERVING AS CHIEF. *See* NAVY 17.

NAVY.

1. Court-Martial—Jurisdiction Over Persons Discharged from the Service.—A person discharged from the naval service before proceedings are instituted against him for violations of the Articles for the Government of the Navy, excepting article 14, can not thereafter be brought to trial before a court-martial for such violations, though committed while he was in the service. 521.
2. Desertion—Pardon—An officer of the Navy who has been dismissed by sentence of court-martial, and subsequently pardoned for the offense for which dismissed, is ineligible for reappointment to the Navy or to membership in the Fleet Naval Reserve. 225.

NAVY—Continued.

3. **Same.**—A person "who has deserted in time of war from the naval or military service of the United States," and who has been pardoned for the offense, is ineligible for reenlistment in the naval service, in view of the provisions of sections 1420 and 1624 of the Revised Statutes, as amended by the act of August 22, 1912 (37 Stat. 356). 225.
4. **Same.**—An enlisted man who has incurred the penalties for desertion prescribed by Revised Statutes, sections 1996 and 1998, as amended, and who has received an unconditional pardon for such offense, is eligible for reentry into the naval service. 225.
5. **Fleet Mail Clerks.**—The special designation by the Postmaster General of A. J. Cassidy, yeoman, first class, as Navy mail clerk for the Atlantic Fleet, after his selection by the Secretary of the Navy but without the promulgation by the Secretary of the Navy of a general regulation covering the designation of a Navy mail clerk for a fleet, was valid, and Yeoman Cassidy has lawfully held this position from the time fixed in his designation. 320.
6. **Same.**—Under the provisions of the act of May 27, 1908 (35 Stat. 417), which authorize the selection and designation of enlisted men of the Navy as Navy mail clerks and provide for additional compensation for such services, the Secretary of the Navy has the power, with uncontrolled discretion, to fix the compensation of Navy mail clerks within the prescribed maximum. 320.
7. **Officers—Acceptance of Medals, Decorations, etc.**—By virtue of a provision of the Army appropriation act of July 9, 1918 (40 Stat. 872), the Department of State is justified in delivering to naval officers of the United States medals and decorations heretofore tendered to such officers through said department by the Governments of nations concurrently engaged with the United States in the present war. 445.
8. **Same.**—The words "medal or decoration," appearing in the provision above referred to, are used in their usual meaning and do not include such articles as bowls, cups, and photographs. 445.
9. **Same.**—Advancement of staff officers in the Medical, Pay, and Construction Corps, and Corps of Civil Engineers, from captain to rear admiral may be made upon selection by the President. 80.
10. **Same.**—Promotion of all staff officers of the Navy to higher offices may be made upon selection by the President. 80.

NAVY—Continued.

11. **Same.—Constructive Pardon.**—The promotion of an officer of the Navy while under charges awaiting trial by general court-martial does not operate as a constructive pardon of the offenses charged against him. 419.
12. **Same.—Where an ensign in the Navy,** while under charges general in their nature and not peculiar to his office of ensign, was commissioned a lieutenant, and was thereafter found guilty of such charges by a general court-martial and sentenced to be dismissed from the service, the Secretary of the Navy was authorized by the law in mitigating his sentence with reference to the grade in which he was permanently serving. 419.
13. **Same.—Certain Line Officers of Navy.**—The Secretary of the Navy is required to transmit to the board of recommendation for selection for promotion of certain line officers of the Navy, provided for by the naval appropriation act of August 29, 1916 (39 Stat. 578), the entire record of such officers since their appointment to the Navy. 87.
14. **Same.—Under the act of May 22, 1917** (40 Stat. 86), the promotion board may consider for promotion captains, commanders, and lieutenant commanders who shall have served four years in their present grades on November 30 of the year of the convening of the board, notwithstanding that at the time of such consideration they have not served four years in their present grades. 142.
15. **Same.—Rank, Title, and Compensation when Serving as Chiefs of Certain Bureaus of the Navy Department.**—An officer of the line on the active list whose actual rank is that of a rear admiral of the upper nine, holding a commission as rear admiral, who is now serving as Chief of the Bureau of Ordnance under a commission as chief of said bureau for the term of four years with the rank of rear admiral and was so serving at the date of the approval of the Navy appropriation act of June 24, 1910, and who has had 30 years' service, remains a rear admiral of the upper nine, and a new commission should not be issued to him. 557.
16. **Same.—An officer of the Pay Corps on the active list** whose actual grade is that of pay director with the rank of captain, holding a commission as such, is now serving as the Chief of the Bureau of Supplies and Accounts with the title of Paymaster General under a commission as chief of said bureau for the term of four years with the rank of rear admiral, having been appointed to that office subsequent to the approval of the act of June 24, 1910, and who has had 30 years' service, should have the rank of rear

NAVY—Continued.

admiral and is entitled to a new commission as of the date when, having 30 years' service, he thereafter began, in the language of the statute, to "serve as chief of bureau." 558.

17. **Same.**—Where an officer of the line on the active list whose actual rank is that of a captain, holding a commission as such, is now serving as Chief of the Bureau of Navigation under the commission as chief of said bureau for a term of four years with the rank of rear admiral, and was so serving at the date of the approval of the Navy appropriation act of June 24, 1910, and has had 30 years' service: (a) such officer is entitled to a new commission as of the date of approval of said act; (b) the issuance of a new commission to such officer does not create a vacancy in the grade of captain in such sense as to authorize the promotion of an officer to fill such vacancy; (c) the commissioning of the Chief of the Bureau of Navigation as a rear admiral does not make him an additional number while on the active list in the already existing grade of rear admiral; (d) when regularly promoted in due course, the present Chief of the Bureau of Navigation (whose actual rank is that of captain) will be required to qualify for promotion to the grade of rear admiral under the provisions of sections 1493 and 1496 of the Revised Statutes. 557.

18. **Same.**—Serving as Bureau Chief or Judge Advocate General—**Rank on Retirement.**—A line officer of the Navy, retired while serving as chief of bureau or judge advocate general, should be placed on the retired list with the rank attached by law to the said position of chief of bureau or judge advocate general. 505.

INSURANCE. See WAR RISK INSURANCE, 2, 5.

PROVISIONAL ASSIGNMENTS. See NAVAL RESERVE FORCE.

REINSTATEMENT UNDER CIVIL SERVICE OF FORMER GOVERNMENT EMPLOYEES IN NAVAL SERVICE. See CIVIL SERVICE, 11.

NAVY, SECRETARY OF.

AUTHORITY TO MITIGATE SENTENCE OF ENSIGN IN NAVY.
See NAVY, 12.

COMPENSATION OF NAVY MAIL CLERKS. See NAVY, 6.

DETERMINATION OF BENEFICIARIES OF MONEY BENEFITS. See PENSIONS, 1.

RECOMMENDATION OF LINE OFFICERS FOR PROMOTION. See NAVY, 13.

SELECTION OF FLEET MAIL CLERK. See NAVY, 5.

NAVY DEPARTMENT.

NAVAL OFFICERS SERVING AS BUREAU CHIEFS. See NAVY, 15, 16, 17, 18.

NAVY YARDS.

Transfer of Machinery to Other Navy Yards.—Machinery and tools appropriated for by Congress for the navy yards at New Orleans and Pensacola can not be transferred to other navy yards without legislative authority for such action. 594.

NET ESTATE. *See* ESTATE TAX, 2.

NEVADA.

Cession of State Jurisdiction. *See* JURISDICTION, 6.

NORTH DAKOTA SEED, FEED, AND BONDING ACT. *See* FEDERAL FARM LOAN ACT, 5.

OATH OF DISINTERESTEDNESS. *See* CONTRACTS, 2.

OFFICER OF THE UNITED STATES. *See* FEDERAL EMPLOYEES' COMPENSATION ACT, 2.

OFFICERS. *See* ARMY, 1, 2, 3; NAVY, 2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18.

ORDNANCE BUREAU.

Rear Admiral Serving as Chief. *See* NAVY, 15.

ORDNANCE MATERIAL.

Plus or Minus Provision in Contract of Purchase. *See* CONTRACTS, 3, 4.

OVERTIME PAY. *See* CONTRACTS, 1.

PANAMA. *See* CANAL ZONE.

PANAMA CANAL.

Wages of Employees.—The provision of the sundry civil appropriation act of July 1, 1913 (40 Stat. 696), that "no money now or hereafter appropriated for the payment of wages not fixed by statute shall be available to pay wages in excess of the standard determined upon by the War Labor Policies Board" does not apply to the wages of employees of the Panama Canal paid under authority of section 4 of the Panama Canal act of August 24, 1912 (37 Stat. 561). 328.

PARDON.

Constructive. *See* NAVY, 11.

Enlisted Men Dismissed from the Naval Service. *See* NAVY, 4.

Naval Officers Dismissed from the Service. *See* NAVY, 2.

PATENTS.

1. Licenses to Use Enemy-Owned Patents.—The Federal Trade Commission has power, by virtue of the authority delegated to it under section 10 (c) of the trading with the enemy act of October 6, 1917 (40 Stat. 420), to issue licenses to use American patents where the record title to such patents is in an enemy but the equitable title thereto rests in an American citizen. 352.
2. Same.—If the United States becomes the owner of a patent it can exercise the usual proprietary rights of such an owner and can, therefore, enforce its rights against unlicensed

PATENTS—Continued.

users; can grant licenses; and can make assignments which carry with them full domination of the patent so far as rights thereunder are conveyed. 463.

3. **Sale of Enemy-Owned Patent to United States.**—Under a provision of the act of March 28, 1918 (40 Stat. 460), which amends section 12 of the trading with the enemy act, the Alien Property Custodian can, for a fair and substantial consideration, sell any property, of which he becomes possessed, to the United States, but he can not sell such property for a merely nominal consideration. 463.

4. **Same.**—The sale of an enemy-owned patent by the Alien Property Custodian to the War Department acting for the United States could hardly affect an existing claim on account of the owner of the patent against the United States for past infringements, and the matter would not seem to be one considered in computing the fair value of the patent which it is proposed shall be sold. 463.

See also RADIO APPARATUS.

PASSPORTS.

The governor of Porto Rico may be authorized to issue passports under the provisions of section 4075 of the Revised Statutes, as amended by the act of June 14, 1902 (32 Stat. 386). 151.

PAY CORPS.

RANK OF DIRECTOR SERVING AS BUREAU CHIEF. *See* NAVY, 16.

PENALTIES.

COMPROMISE, UNDER INCOME-TAX LAWS. *See* INCOME TAX, 1.

PENNSYLVANIA WORKMEN'S COMPENSATION FUND. *See* TAXATION, 4, 5.

PENSACOLA NAVY YARD. *See* NAVY YARDS.

PENSIONS.

1. **Money Benefits Under Section 4756, Revised Statutes.**—The Secretary of the Navy has exclusive jurisdiction to determine who are entitled to the money benefits granted by section 4756 of the Revised Statutes and, after that official has issued a certificate allowing same, the Commissioner of Pensions in making payment of said money benefits acts only in a ministerial capacity. 127.

2. **Same.**—The question propounded by the Secretary of the Interior as to whether the payments provided for under section 4756 of the Revised Statutes are within the purview of the term "pensions" as used in the act of June 30, 1914 (38 Stat. 398), pertains rather to the administration of the Navy Department than of the Department of the Interior, and as the Secretary of the Navy has not requested an opinion with respect to this question, the Attorney

PENSIONS—Continued.

General is precluded by the settled rule of his department from expressing an opinion in regard to it. 127.

3. **Same.—Inmates of the Naval Home.**—The money benefits provided for in section 4756 of the Revised Statutes are "pensions" within the purview of section 4813 of the Revised Statutes and the pertinent provision of the act of June 30, 1914 (38 Stat. 398), and such money benefits inure to the grantees concurrently with maintenance in the Naval Home. 268.
4. **Same.—Allowances under sections 4756 and 4757 of the Revised Statutes** do not fall within the prohibition of section 4715 of the Revised Statutes, and may therefore be paid in addition to a pension under the general pension laws. 268.
5. **Same.—Allowances under section 4757 of the Revised Statutes** are "pensions" within the meaning of section 4813 of the Revised Statutes and the said act of June 30, 1914, and should therefore be disposed of, in cases where the beneficiaries are inmates of the Naval Home, in the manner prescribed by that act. 268.

ACCRUED PENSIONS. *See* WAR RISK INSURANCE, 1.

PENSIONS, COMMISSIONER OF.

PAYMENT OF MONEY BENEFITS. *See* PENSIONS, 1.

PHILIPPINE ISLANDS.

1. **Issuance of Certificates of Indebtedness.**—Certificates of indebtedness in the sum of \$10,000,000 par value which the Government of the Philippine Islands proposes to issue to maintain the required parity between the silver and the gold peso and to meet an emergent exchange situation, as provided by an act of Congress of March 2, 1903, and also by an act of the Philippine Legislature of May 6, 1918, will, if and when issued in the form and under the conditions herein stated, be the valid obligations of the Philippine Government. 426.
2. **Legality of Bond Issue of Iloilo, P. I.**—The proposed issue of \$250,000 bonds by the municipality of Iloilo, P. I., under the authority of the act of March 9, 1917, of the Philippine Legislature, assuming that the issue is necessary to anticipate taxes and is within the debt limit provisions of the act of Congress of August 29, 1916 (39 Stat. 545), will be, when made in accordance with the provisions of said act of the Philippine Legislature, a valid and binding obligation. 131.

PLUS OR MINUS PROVISION, GOVERNMENT CONTRACTS. *See* CONTRACTS, 3, 4, 5.

PORTO RICO.

1. **Bond Issue.—Legality.**—The proposed issue of bonds by Porto Rico to the amount of \$500,000 for the construction of roads and bridges, as provided by act No. 71 of the Legislative Assembly of Porto Rico of April 13, 1916, not being in excess of the limit of indebtedness imposed by section 3 of the act of Congress of March 2, 1917 (39 Stat. 953), and the form of the proposed bonds complying with the conditions prescribed by the regulation of the executive council of Porto Rico of April 2, 1918, said bonds will be the valid and binding obligations of the people of Porto Rico. 342.
2. **Same.**—The proposed issue by Porto Rico of \$300,000 insular loans refunding bonds, under authority of act No. 120, approved July 26, 1913, of the Legislative Assembly of Porto Rico, not being in excess of the debt limit provision of the act of Congress of April 12, 1900 (31 Stat. 86), will, provided the requirements of said act No. 120 are complied with, when duly sold, delivered, and paid for, constitute the valid obligation of the People of Porto Rico. 106.
3. **Same.**—The proposed issue of bonds by Porto Rico to the amount of \$200,000 for the improvement of the irrigation system, as authorized by act No. 23 of the Legislature of Porto Rico of November 22, 1917, not being in excess of 7 per cent of the aggregate tax valuation of the property of Porto Rico, as required by section 3 of its organic act of March 2, 1917 (39 Stat. 953), the bonds will, if issued under the conditions prescribed by the said act of Porto Rico of November 22, 1917, be valid and binding obligations upon the people of Porto Rico. 373.
4. **Importation of Alcohol from Porto Rico.**—The importation of alcohol from Porto Rico is absolutely prohibited, if produced *prior* to the passage of the war revenue act of October 3, 1917. 196.
5. **Same.**—Alcohol produced after the passage of the war revenue act of October 3, 1917, may be brought into the United States from Porto Rico free of duty, but under such rules, regulations, and bonds as the Secretary of the Treasury may prescribe, and may then be withdrawn *free of tax* for denaturation for any of the purposes for which domestic alcohol may be withdrawn free of tax from a distillery or distillery warehouse. 196.
6. **Passports.**—The governor of Porto Rico may be authorized to issue passports under the provisions of section 4075 of the Revised Statutes, as amended by the act of June 14, 1902 (32 Stat. 386). 151.

PORTO RICO—Continued.

7. **Term of Office of Certain Officials.**—Section 52 of the organic act of Porto Rico of March 2, 1917 (39 Stat. 967), did not have the effect of reappointing the present attorney general, commissioner of education, and auditor of Porto Rico to a new term of office, but these officials are continued in office under their original appointments. 381.

POST OFFICE DEPARTMENT.

REDEMPTION OF WAR-SAVINGS STAMPS. *See* WAR-SAVINGS CERTIFICATES AND STAMPS, 1, 2.

POSTAL SAVINGS SYSTEM.

Alaskan Banks.—The board of trustees of the Postal Savings System may properly accept from banks organized under the laws of the Territory of Alaska security to insure the safety and prompt payment of postal deposits pursuant to the provisions of section 9 of the act of June 25, 1910 (36 Stat. 816), as amended by section 2 of the act of May 18, 1916 (39 Stat. 159). 41.

POSTAL SERVICE.

1. **Authority to Design Letter Boxes.**—The power to determine the character and quality of letter boxes for the entire postal system is vested in the Postmaster General, and the Art Commission of New York has no right to control the design of letter boxes to be erected in that city. 73.
2. **Rural Post Roads.**—The four classes of roads herein specified are "rural post roads" within the meaning of section 2 of the Federal aid road act of July 11, 1916 (39 Stat. 355), and therefore funds appropriated by that act may properly be expended upon any of them. 109.

POSTMASTER GENERAL.

AUTHORITY TO DESIGN LETTER BOXES. *See* POSTAL SERVICE, 1.
DESIGNATION OF FLEET MAIL CLERK. *See* NAVY, 5.

POTASSIUM.

1. **Antitrust Laws—Discriminatory Export Duty.**—Where the owners of potash mines in Germany entered into an agreement, the effect of which is to place all the potash mines in Germany, with one exception, under the control of a syndicate which fixes the selling price of potash for every mine, and the syndicate established connections with an American corporation for the sale of its potash shipped into the United States, such facts are subject to the provisions of the act of August 27, 1894 (28 Stat. 570), prohibiting combinations in restraint of import trade; and such facts also establish a violation of the provisions of the Sherman Antitrust Act of July 2, 1890 (26 Stat. 209), as constituting a "contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * * with foreign nations." 545.

POTASSIUM—Continued.

2. Same.—Whether the tax imposed by the German potassium salts law of May 10, 1910, upon potash shipped into this country is a discriminatory export duty within the meaning of section 2 of the tariff act of August 5, 1909 (36 Stat. 82), is a question of fact that must be determined by the President; and, in determining whether such tax is discriminatory, the President should consider all the attendant facts and circumstances. 546.
3. Exploration for and Disposition of Potassium on Public Lands in National Forests.—The Act of October 2, 1917 (40 Stat. 297), authorizing exploration for and disposition of potassium, applies to public lands reserved as national forests. 433.

PRESIDENT.

- AUTHORITY TO APPOINT OFFICERS OF VETERINARY CORPS. *See* ARMY, 1.
- AUTHORITY TO CHANGE BOARD OF GENERAL APPRAISERS. *See* CUSTOMS SERVICE, 2.
- AUTHORITY TO CONSOLIDATE OFFICES. *See* CUSTOMS SERVICE, 3.
- AUTHORITY TO DETERMINE WHETHER GERMAN POTASH TAX IS DISCRIMINATORY. *See* POTASSIUM, 2.
- AUTHORITY TO DIRECT PURCHASE OF ALASKA NORTHERN RAILWAY STOCK. *See* ALASKA NORTHERN RAILWAY CO.
- AUTHORITY TO INCREASE FUNCTIONS OF EMPLOYEES, CUSTOMS DIVISION. *See* CUSTOMS SERVICE, 4.
- AUTHORITY TO NOMINATE NAVAL OFFICER FOR JUDGE. *See* VIRGIN ISLANDS.
- AUTHORITY TO PROMULGATE AMENDED REGULATION PUBLIC HEALTH SERVICE. *See* PUBLIC HEALTH SERVICE.
- INCOME TAX ON SALARY. *See* INCOME TAX, 12, 13.
- POWER TO REQUISITION COTTONSEED CAKE. *See* FOOD AND FUEL ACT.
- PROMOTION OF NAVY OFFICERS. *See* NAVY, 9, 10.

PRICES.

- PRICE FIXING. *See* FOOD ADMINISTRATION.
- STABILIZING, IN BASIC INDUSTRIES. *See* ANTITRUST LAWS, 2.

PROCESS.

- RIGHT OF STATE TO SERVE PROCESS ON CEDED TERRITORY. *See* JURISDICTION, 3.
- PROMOTIONS. *See* NAVAL RESERVE FORCE; NAVY, 9, 10, 11, 12, 13, 14, 15, 16; PUBLIC HEALTH SERVICE.

PUBLIC HEALTH SERVICE.

- Amended Regulation.—The President has authority to promulgate the amended regulation 47 of the Public Health Service, which gives passed assistant surgeons a right to promotion to any vacancy in the grade of surgeon.

PUBLIC HEALTH SERVICE—Continued.

whether a vacancy exists or not, after 12 years' service and passing an examination, provided they are appointed by the President, with the advice and consent of the Senate; and the fact that the amended regulation will or will not have an effect to create or increase a deficiency in the pay fund appears to bear upon its wisdom as an administrative measure and not upon its legality. 570.

SURGEON IN, AN OFFICER OF UNITED STATES. *See* **FEDERAL EMPLOYEES' COMPENSATION ACT, 2.**

PUBLIC LANDS.

1. **Exploration for and Disposition of Potassium on Public Lands in National Forests.**—The act of October 2, 1917 (40 Stat. 297), authorizing exploration for and disposition of potassium, applies to public lands reserved as national forests. 433.
2. **Leasing Public Lands Withdrawn for Irrigation Purposes.**—The authority to lease for summer recreation purposes land around Bumping Lake withdrawn for irrigation uses but not required for the irrigation project, which land constituted part of the area previously withdrawn for the Rainier National Forest, is in the Department of Agriculture, and the rentals should be covered into the Treasury as miscellaneous receipts. But in recognition of the needs of the reclamation service, and to forestall any contracts detrimental to the reclamation project, all leases should be subject to the prior approval of the Secretary of the Interior. 56.
3. **Sitka, Alaska.—Sale of Land Underlying Government Wharf and Warehouse.**—The Secretary of the Treasury is authorized to dispose of the land above high-water mark underlying the Government wharf and warehouse at Sitka, Alaska. 544.
4. **Same.**—The wharf may be conveyed with the right to maintain it as located subject to the laws enacted in the interests of commerce, navigation, and fishery with respect to the land lying below high-water mark. 544.
5. **Title to Lands Within Fort D. A. Russel Target and Maneuver Reservation.**—Where lands within the Fort D. A. Russell Target and Maneuver Reservation were offered in exchange for other public lands outside the reservation, under the exchange provisions of the act of June 4, 1897 (30 Stat. 36), but the lieu selections were disapproved and canceled by the Land Department, the full equitable title, at least, to the lands tendered in exchange, remains in the selector, and the Government has no right whatever to the possession or use of the lands tendered in exchange. 60.

PUBLIC LANDS—Continued.

6. *Same.*—The title to base lands offered in exchange under the said act of June 4, 1897, does not pass to the Government upon the filing in the local land office of a recorded deed purporting to convey them to the United States, notwithstanding that the lieu selections are disapproved and canceled by the Land Department. 61.
7. **Withdrawals of Public Lands—Forest Reserves.**—Withdrawals of public lands may be made in aid of pending legislation looking to the inclusion of such lands within existing national forests in those States in which there is a prohibition against the creation of national forests or making additions to existing national forests, except by act of Congress. 53.

RADIO APPARATUS.

Agreement Relating to Radio Apparatus.—The Vreeland Apparatus Co., by its agreement dated July 1, 1916, with the Atlantic Communication Co., conveyed to the latter company such right, title, or interest in the radio apparatus covered by the patents to which the agreement relates as precludes it from delivering to the Government a license to make, use, and sell, or to have made for its use, said apparatus. 530.

RAILROAD ADMINISTRATION EMPLOYEES. See CIVIL SERVICE, 2.
RAILROADS.

Government-Controlled Railroads—Assignment or Prosecution of Action.—Neither the taking over and the operation of the railroads by the Government nor the order of the Director General of Railroads requiring that an action to recover damages against a Government-controlled railroad be brought directly against the said Director General of Railroads has deprived the United States Employees' Compensation Commission of the power to require a beneficiary to assign his right of action to the United States or prosecute said action as a condition to settlement. 365.

See also ALASKA NORTHERN RAILWAY Co.; CIVIL SERVICE, 2.

RAILROADS, DIRECTOR GENERAL OF. See CIVIL SERVICE, 2;
RAILROADS.**RAINIER NATIONAL FOREST. See PUBLIC LANDS, 2.****RANK OF OFFICERS SERVING AS BUREAU CHIEFS. See NAVY,**
15.**REAL ESTATE.**

TAXATION. See ESTATE TAX, 1.

"RECEIVER" SAND AND GRAVEL BAR. See WATERCOURSES.**RECEIVERS.**

1. **Appointment of Receiver for Union National Bank.**—The Comptroller of the Currency has authority, under section 1

RECEIVERS—Continued.

of the act of June 30, 1876 (19 Stat. 63), to appoint a receiver to enforce the individual liability of the shareholders of a national bank on the ground of its insolvency after as well as before it has gone into voluntary liquidation. 157.

2. Same.—The Comptroller of the Currency has no authority to appoint a receiver for the Union National Bank of Indianapolis, Ind., to enforce the statutory liability of its shareholders, under the circumstances herein stated. 157.

RED CROSS.

CONTRIBUTIONS BY CORPORATIONS. *See* INCOME TAX, 2.

REVENUE LAWS. *See* CUSTOMS LAWS; FRUIT DISTILLERIES; INCOME TAX, 10.

TAX ON REAL ESTATE OUTSIDE UNITED STATES. *See* ESTATE TAX.

RIPARIAN RIGHTS. *See* WATERCOURSES.

RIVERS. *See* WATERCOURSES.

RURAL POST ROADS. *See* POSTAL SERVICE, 2.

SAILORS.

PREFERENCE IN APPOINTMENT. *See* CIVIL SERVICE, 6, 7, 8, 19, 20.

REINSTATEMENT IN GOVERNMENT SERVICE. *See* CIVIL SERVICE, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18.

ST. ELIZABETHS HOSPITAL.

1. Admission of Insane Patient of the Bureau of War Risk Insurance.—Curtis M. Berry, an enlisted man who had served some time in the United States Army and who was discharged therefrom because of his insanity, was properly admitted to St. Elizabeths Hospital upon the order of the Secretary of the Treasury as an insane patient of the Bureau of War Risk Insurance. 431.
2. Same.—The hospital service to which Berry was entitled is included in the purposes for which appropriations are made for the use of war risk insurance, and the cost of the same should be paid out of these appropriations. 431.
3. Same.—The only provision for a judicial inquiry into the mental status of any persons previous to their admission to St. Elizabeths Hospital is in the case of indigent persons residing in the District of Columbia, and as Berry does not come within this class, no such judicial inquiry is necessary in his case. 431.
4. Allowances to Inmates.—Allowances under sections 4756 and 4757 of the Revised Statutes which accrue to inmates of St. Elizabeths Hospital should be paid to the superintendent of the hospital, notwithstanding such inmates are represented by a legal guardian or committee. 354.

SALARIES.

1. Appointment of Field Representative of Geological Survey at Salary of \$1 a Year.—The employment of Mr. Blucher, who is secretary of the Southwest Coal Bureau, at a salary of \$1 a year as a field representative of the Geological Survey for the purpose of collecting weekly reports of coal production, etc., would cause a violation of the proviso to the act of March 3, 1917 (39 Stat. 1106), prohibiting officials and employees from receiving other than Government salaries for services, for the reason that the salary received by him from the Southwest Coal Bureau would, to some extent at least, be received and paid in connection with services performed by him for the Government. 470.

2. Wages of Canal Zone Employees.—It would be legal for the Panama Canal authorities to revise the scale of wages in effect on the Isthmus so that the same should be based on the wages of civilian employees of the naval establishments in the continental United States after the latter have received the benefit of the increases provided in the naval appropriation act of March 4, 1917 (39 Stat. 1195). 138.

3. Wages of Panama Canal Employees.—The provision of the sundry civil appropriation act of July 1, 1918 (40 Stat. 696), that "no money now or hereafter appropriated for the payment of wages not fixed by statute shall be available to pay wages in excess of the standard determined upon by the War Labor Policies Board" does not apply to the wages of employees of the Panama Canal paid under authority of section 4 of the Panama Canal act of August 24, 1912 (37 Stat. 561). 328.

Income Tax.—The salaries and wages of State officials and employees are not subject to the income tax imposed by the revenue act of February 24, 1919 (40 Stat. 1057). 441.

COMPTROLLER OF CURRENCY. *See* FEDERAL RESERVE BOARD, 3.

INCOME TAX. *See* INCOME TAX, 11, 12, 13.

RIGHT OF EX OFFICIO MEMBER FEDERAL RESERVE BOARD TO RECEIVE SALARY. *See* FEDERAL RESERVE BOARD, 3.

SALES TO A STATE.

EXCISE TAX ON SALES BY MANUFACTURERS, ETC. *See* TAXATION, 3.

SAND AND GRAVEL BARS. *See* WATERCOURSES.

SCHOFIELD BARRACKS, HAWAII. *See* NATIONAL BANKS, 3.

SEAMEN.

MONEY BENEFITS TO DISABLED SEAMEN. *See* PENSIONS, 1, 2.

SECURITIES.

INCOME TAX ON DEALERS IN SECURITIES. *See* INCOME TAX, 9.

SEIZURE AND FORFEITURE PROCEEDINGS AUTHORIZED FOR VIOLATIONS OF REVENUE LAWS. *See* LIQUORS, 8.

SELECTIVE SERVICE ACT.

1. **Liability to Military Service of Neutral Declarants.**—The amendment of section 2 of the selective service act, which is set forth in section 4, chapter 12, of the Army appropriation act of July 9, 1918, provides for the exemption from military service, upon conditions therein set forth, of all citizens or subjects of countries neutral in the present war who have declared their intention to become citizens of the United States, including those who had been drafted into the military service at the time of its enactment. 339.
2. **Veterinary Corps.—Appointment of Officers.**—The selective service act of May 18, 1917 (40 Stat. 76) authorizes the President to appoint officers of the grades of colonel and lieutenant colonel in the Veterinary Corps, United States Army. 387.

SENATE.

FAILURE TO ACT ON NOMINATION OF PUBLIC OFFICER. *See* FEDERAL RESERVE BOARD, 2.

SHIPPING BOARD EMERGENCY FLEET CORPORATION. *See* FEDERAL EMPLOYEES' COMPENSATION ACT, 3.

SIGNATURE.

1. **Affixing Facsimile Signature to Orders, Vouchers, etc.**—The affixing of the stamped facsimile signature of the Chief of the Bureau of Navigation to orders, vouchers, etc., properly initialed by officers duly authorized to affix the same thereto, under the direction and control of the Chief of the Bureau of Navigation, is a sufficient approval thereof by the Chief of the Bureau of Navigation. 349.
2. **Same.**—The Chief of the Bureau of Navigation can not transfer to others any duty which the law imposes upon him in connection with the approval of orders, vouchers, etc., but after he has in some appropriate way passed judgment in such cases, the manual act of affixing his signature in evidence of his approval may be done by others thereunto duly authorized by him. 349.
3. **Signing Certificate Attached to Farm Loan Bonds.**—Under the provision in section 21 of the Federal farm loan act of July 17, 1916 (39 Stat. 377), which requires every farm loan bond to contain a certificate signed by the Farm Loan Commissioner, the certificate may be signed by an engraved facsimile signature of the Farm Loan Commissioner. 148.

SITKA, ALASKA.

SALE OF LAND UNDERLYING WHARF. *See* PUBLIC LANDS, 3, 4.

SOLDIERS.

ADMISSION TO ST. ELIZABETHS HOSPITAL. *See* ST. ELIZABETHS HOSPITAL, 1, 2, 3.

PREFERENCE IN APPOINTMENT. *See* CIVIL SERVICE, 6, 7, 8, 19.

REINSTATEMENT IN GOVERNMENT SERVICE. *See* CIVIL SERVICE, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18.

SOUTHWEST COAL BUREAU.

SECRETARY, APPOINTMENT TO GEOLOGICAL SURVEY. *See* SALARIES, 1.

SOVEREIGNTY.

OF UNITED STATES OVER SWAN ISLANDS. *See* SWAN ISLANDS, 1, 2, 3.

SPIES.

Trial by Military Tribunals.—A person apprehended upon United States territory not under martial law, who had not entered any camp, fortification, or other military premises of the United States and who had not come through the fighting lines or field of military operations, can not be tried as a spy by a military tribunal, and to such a case section 1343 of the Revised Statutes and article 82 of the Articles of War can not constitutionally be applied. 356.

SPIRITS. *See* DISTILLED SPIRITS; LIQUORS, 13, 14, 18, 19, 20, 21.

SQUANTUM POINT, MASS.

Acquisition of Land at Squantum Point for Construction of Torpedo-Boat Destroyers.—Upon the taking over by the President of certain land at Squantum Point, Mass., for the construction of torpedo-boat destroyers, as provided for by the act of October 6, 1917 (40 Stat. 371), a valid title to the land so taken vested in the United States, and the expenditures authorized by said act for the acquisition of such land are not subject to the provisions of section 355 of the Revised Statutes. 242.

STAMP TAX.

Borrowing and Return of Stock.—The stamp tax imposed by sections 800 and 807, Schedule A, subdivision 4, of the war revenue act of October 3, 1917 (40 Stat. 319, 322), applies to the so-called borrowing and return of shares or certificates of stock. 255.

STATE, DEPARTMENT OF.

AUTHORITY TO DELIVER MILITARY DECORATIONS. *See* NAVY, 7.

STATE BANKS.

CHECK CLEANERS. *See* FEDERAL RESERVE BANKS.

STATISTICS BUREAU, COMMERCE AND LABOR DEPARTMENT.

TRANSFER OF CERTAIN FUNCTIONS. *See* CUSTOMS SERVICE, 8.

STATUTORY CONSTRUCTION.

Effect of Subsequent General Act Upon Prior Special Act.—

A later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. 585.

STOCK.

BORROWING AND RETURN OF SHARES, ETC. *See* **STAMP TAX.**

INCOME TAX ON DIVIDENDS. *See* **INCOME TAX**, 14, 15.

SUGAR REFINERS.

AGREEMENT WITH FOOD ADMINISTRATOR. *See* **FOOD ADMINISTRATION.**

SURVEYORS.

CUSTOMS SERVICE. *See* **CUSTOMS SERVICE**, 1.

SWAN ISLANDS.

1. **Sovereignty Over Swan Islands.**—The United States has never acquired sovereignty of any kind or to any extent over the Swan Islands in the Carribbean Sea by reason of the provisions of the Guano Islands act of August 18, 1856 (11 Stat. 119). 216.

2. **Same.**—The United States Government may at any time assert its sovereignty over the Swan Islands by appropriate action and no other country has any proper claim to these islands. 216.

3. **Same.**—The property rights of the Swan Island Commercial Co. in the Swan Islands are dependent upon the assumption of sovereignty over these islands by the United States Government and, upon such assumption, there can be no doubt that the rights of the company in the lands occupied and improved by it will become at least so equitably fixed as to warrant some provision for compensation by the Government. 216.

"TARBERT" SAND AND GRAVEL BAR. *See* **WATERCOURSES.**

TARIFF. *See* **CUSTOMS LAWS.**

TARIFF COMMISSION.

DISCLOSURE OF TRADE SECRETS. *See* **TRADE SECRETS**, 1, 2.

TAXATION.

1. **Casualty Insurance Policies Issued on Weekly or Monthly Payment Plan.**—In calculating the tax imposed by the proviso of section 503 (c) of the revenue act of February 24, 1919 (40 Stat. 1104), on casualty insurance policies, issued on the weekly or monthly payment plan, only the regular weekly or monthly premium can be included and the policy fee must be excluded. 398.

2. **Corporation Tax.**—A corporation owning Liberty bonds is not to that extent exempt from excise taxes, franchise taxes, and other corporation taxes of the Federal and State Governments when such taxes are laid upon the value of the exercise of corporate privileges. 125.

TAXATION—Continued.

3. **Excise Tax—Sales to a State or a Political Subdivision Thereof.**—The excise tax imposed by section 900 of the act of February 24, 1919 (40 Stat. 1122), upon sales by manufacturers, producers, or importers of the articles enumerated in said section, applies to sales of such designated articles to a State or a political subdivision thereof, except those articles specified in subdivision 10 of the section. 520.
4. **Pennsylvania Workmen's Compensation Fund and Insurance Policies Thereunder.**—The Pennsylvania workmen's compensation fund, which is established to insure employers against the liability imposed by the State workmen's compensation act, is exempt from taxation under section 11, paragraph (b) of the income-tax act of September 8, 1916 (39 Stat. 767). 308.
5. **Same.**—Policies of insurance issued by the State of Pennsylvania under the provisions of the State workmen's compensation act are not subject to the special tax imposed upon policies of insurance by section 504, paragraph (c), of the war revenue act of October 3, 1917 (40 Stat. 316). 308.
6. **War Tax on Articles Sold in Foreign Commerce.**—The tax levied by section 600, and by the analogous sections, of the war revenue act of October 3, 1917 (40 Stat. 316, et seq.), upon articles sold by a manufacturer, producer, or importer, does not apply to sales in foreign commerce by a manufacturer, producer, or importer located in one of the several States of the United States. 239.
7. **War Tax on Interstate Freight.**—Section 500 of the war revenue act of October 3, 1917 (40 Stat. 314), should be construed as not intended to cover freight on articles in course of exportation. 239.
8. **Same.**—The question whether articles are in course of exportation does not depend upon the bill of lading or like formal matters, but upon the real substance and intent of the shipment. 239.

BEER. *See LIQUORS, 5, 6, 7.*

BORROWING AND RETURN OF STOCK, ETC. *See STAMP TAX.*

CIDER. *See LIQUORS, 9, 10, 11, 12.*

DISTILLED SPIRITS FOR NONBEVERAGE PRODUCTS. *See DISTILLED SPIRITS, 6.*

EXEMPTION OF FIRST MORTGAGES. *See FEDERAL FARM LOAN ACT, 1.*

IMPORTATION OF ALCOHOL INTO UNITED STATES. *See PORTO RICO, 4, 5.*

REAL ESTATE OUTSIDE THE UNITED STATES. *See ESTATE TAX, 1.*

TENURE OF OFFICE. *See* PORTO RICO, 7.

TIMBER.

SALE BY SECRETARY OF AGRICULTURE. *See* NATIONAL FORESTS, 1, 4.

SALE BY SECRETARY OF INTERIOR. *See* NATIONAL FORESTS, 2, 3.

TITLE OF OFFICERS SERVING AS BUREAU CHIEFS. *See* NAVY, 16.

TITLE TO LANDS. *See* PUBLIC LANDS, 5, 6; SQUANTUM POINT, MASS.

TORPEDO-BOAT DESTROYERS.

ACQUISITION OF LAND FOR CONSTRUCTION. *See* SQUANTUM POINT, MASS.

TRACTORS.

Leasing for Commercial Purposes.—As part of the consideration for the purchase of certain war material acquired by the Government since April 6, 1917, the Secretary of War is authorized, when in his discretion it will be for the public good, to lease for commercial purposes, for a period not exceeding five years and revocable at any time, caterpillar tractors, dies, and gauges belonging to the United States, under the provisions of the act of July 28, 1892 (27 Stat. 321). 457.

TRADE SECRETS.

1. **Tariff Commission—Disclosure of Trade Secrets.**—The United States Tariff Commission is not prohibited from placing in the hands of the War Trade Board for appropriate use trade secrets which have come into the possession of the commission in the course of the exercise of its official functions. 541.

2. **Same.**—The tariff commission should furnish such information to the War Trade Board only after due consideration of the use designed to be made of it, and if, as a result of its inquiry, the commission has any doubt as to whether the proposed use of such information would be inimical to the purpose of the statutory inhibition against divulging trade secrets, it would be entirely within the scope of its sound discretion to decline to disclose it. 541.

TRADING WITH THE ENEMY ACT.

ENEMY-OWNED PATENTS. *See* PATENTS, 1, 3.

TREASURY, SECRETARY OF.

AUTHORITY TO BRING SUIT FOR REFUND OF EXCESSIVE DRAWBACK. *See* CUSTOMS LAWS, 11.

AUTHORITY TO DECIDE BETWEEN INTOXICATING AND NONINTOXICATING LIQUORS. *See* LIQUORS, 4.

AUTHORITY TO DISPOSE OF LAND AT SITKA, ALASKA. *See* PUBLIC LANDS, 3.

TREASURY, SECRETARY OF—Continued.

AUTHORITY TO GRANT ACCESS TO FEDERAL INCOME-TAX RETURNS. *See* INCOME TAX, 4.

AUTHORITY TO ISSUE ORDER ADMITTING INSANE PATIENT TO ST. ELIZABETHS HOSPITAL. *See* ST. ELIZABETHS HOSPITAL, 1.

AUTHORITY TO PAY COMMISSIONS, ETC., INCURRED IN SECURING ENEMY PROPERTY. *See* ALIEN PROPERTY CUSTODIAN, 1.

REGULATIONS FOR REDEMPTION OF WAR-SAVINGS STAMPS. *See* WAR-SAVINGS CERTIFICATES AND STAMPS, 1, 2.

TREASURY DEPARTMENT.

APPOINTMENT DIVISION. *See* CUSTOMS SERVICE, 3.

CUSTOMS DIVISION. *See* CUSTOMS SERVICE, 3.

REPORTS ON MANUFACTURE, ETC., CIDER. *See* LIQUORS, 12.

REGULATIONS. *See* INCOME TAX, 8, 9; WAR-SAVINGS CERTIFICATES AND STAMPS, 1, 2.

SPECIAL AGENTS DIVISION. *See* CUSTOMS SERVICE, 3.

TREATIES. *See* CANAL ZONE, 2; TABLE, p. xix.

TRUSTEE.

FIDUCIARY PERMIT TO NATIONAL BANKS. *See* FEDERAL RESERVE BOARD, 1.

UNION NATIONAL BANK, INDIANAPOLIS, IND. *See* RECEIVERS, 1, 2.

UNITED STATES.

JURISDICTION OVER LANDS CEDED BY STATES. *See* JURISDICTION, 1, 2, 3, 4, 5, 6.

RIGHTS AS OWNER OF PATENT. *See* PATENTS, 2.

SOVEREIGNTY OVER SWAN ISLANDS. *See* SWAN ISLANDS, 1, 2, 3.

TITLE TO LAND. *See* SQUANTUM POINT, MASS.

UNITED STATES ASSISTANT ATTORNEY. *See* FEDERAL EMPLOYEES' COMPENSATION ACT, 1.

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION.
See FEDERAL EMPLOYEES' COMPENSATION ACT, 3; RAILROADS.

UNITED STATES TARIFF COMMISSION.

USE OF TRADE SECRETS. *See* TRADE SECRETS, 1, 2.

VETERANS.

REOPENING OF CIVIL-SERVICE EXAMINATIONS TO VETERANS.
See CIVIL SERVICE, 19, 20.

VETERINARY CORPS.

APPOINTMENT OF OFFICERS. *See* ARMY, 1.

VIRGIN ISLANDS.

Judge in Virgin Islands.—The President may nominate a naval officer for the position of judge in the Virgin Islands. 118.

VREELAND APPARATUS CO.

PATENT RIGHTS. *See* RADIO APPARATUS.

WAGES.

EMPLOYEES, CANAL ZONE. *See* SALARIES, 2.

EMPLOYEES, PANAMA CANAL. *See* SALARIES, 3.

WAR, SECRETARY OF.

AUTHORIZED TO LEASE TRACTORS FOR COMMERCIAL USE. *See* TRACTORS.

WAR CONTRACTS.

ADJUSTMENT. *See* CONTRACTS, 4, 5; MANGANESE.

WAR DEPARTMENT.

OFFICER IN. *See* ARMY, 2.

PURCHASES OF PROPERTY FOR UNITED STATES. *See* PATENTS, 4.

WAR FINANCE CORPORATION ACT.

Advances to Banks—The 10 per cent limitation imposed by section 10 of the War Finance Corporation act of April 5, 1918 (40 Stat. 509), applies to advances made by the War Finance Corporation to banks under the authority of section 7 of said act. 332.

WAR MATERIAL.

SALE. *See* TRACTORS.

WAR MINERALS RELIEF ACT. *See* MANGANESE.

WAR REVENUE ACT.

IMPORTATION OF ALCOHOL INTO UNITED STATES. *See* PORTO RICO, 4, 5.

IMPORTATION OF DISTILLED SPIRITS. *See* LIQUORS, 18, 19, 20, 21.

TAX ON ARTICLES SOLD IN FOREIGN COMMERCE. *See* TAXATION, 6.

TAX ON INTERSTATE FREIGHT. *See* TAXATION, 7.

WAR RISK INSURANCE.

1. *Accrued Pensions.*—A sergeant in the Marine Corps who prior to the enactment of the war risk insurance act of October 6, 1917, had served in the corps for more than 21 years and who had become "disabled from sea service" by a wound received in action in June, 1916, but who, though entitled to honorable discharge from the service upon October 6, 1917, did not actually receive his discharge until November 5, 1917, is entitled both to the benefits of section 4756 of the Revised Statutes and also to whatever allowance he may be otherwise entitled to under the provisions of the war risk insurance act. 296.

2. *Application for Insurance.*—The privilege of applying for insurance under section 400 of the amendment of October 6, 1917, to the war risk insurance act (40 Stat. 409), is confined to persons in the military or naval service of the United States, including, of course, their duly authorized representatives. 188.

WAR RISK INSURANCE—Continued.

3. **Conversion of Term Insurance.**—The Bureau of War Risk Insurance may, without awaiting the formal termination of the war as declared by proclamation of the President of the United States, convert war-time term insurance heretofore granted under the provisions of the war risk insurance act into other forms of insurance authorized by said act. 382.
4. **Payment of Commuted Value of Policy to Insured's Estate Under War Risk Insurance Act.**—Inclusion in the converted insurance policies proposed to be issued under the war risk insurance act of a provision that the commuted value of the policy shall be payable to the estate of the insured, in the event of the failure of any person within the permitted classes to survive the insured, or in the event of the exhaustion by death of all persons within those classes before the payment of the full number of installments provided for, is authorized by the law and will be valid. 387.
5. **Repeal of Gratuity Laws.**—Section 312 of the act of October 6, 1917 (40 Stat. 406), which is an amendment to the war risk insurance act, repealed the act of October 6, 1917 (40 Stat. 392), providing for the payment of six months' gratuity to the widow, children, or other dependents of a deceased officer or enlisted man of the Navy or Marine Corps, except in so far as rights under the latter act may possibly have accrued between the time of its approval and the time of the approval of the former act on October 6, 1917. 205.
6. **Total Disability Occurring Before Application.**—Under a provision of the war risk insurance act of October 6, 1917 (40 Stat. 409), an enlisted man, who was in the active service at the time of the publication of the terms and conditions of the contract of insurance covering total permanent disability, and who sustained such disability before the expiration of 120 days from such publication, without having applied for such insurance, is entitled to be treated as having been automatically insured and to receive \$25 per month. 534.
7. **Same.**—The Bureau of War Risk Insurance is unauthorized to grant insurance against total permanent disability upon an application made therefor after such disability has been sustained, and hence any premiums paid upon insurance thus applied for should be returned to the applicant. 534.

COST OF HOSPITAL SERVICES FROM APPROPRIATIONS. See **ST. ELIZABETH'S HOSPITAL**, 2.

WAR RISK INSURANCE ACT. See **WAR RISK INSURANCE**, 1, 2, 3, 4, 5, 6.

WAR RISK INSURANCE BUREAU. *See* ST. ELIZABETHS HOSPITAL, 1; WAR RISK INSURANCE, 7.

WAR-SAVINGS CERTIFICATES AND STAMPS.

1. Redemption of War-Savings Certificates and Stamps.—The Attorney General declines compliance with the request of the Postmaster General for an opinion as to the validity of articles 9 and 10 of the Treasury Regulations, relating to the redemption of war-savings certificates and stamps of deceased owners, because the question is not one arising in the administration of the Post Office Department. 234.
2. Same.—The payment or redemption of these certificates and stamps by postmasters or employees of the Post Office Department, if arranged by comity, must be in accordance with the regulations prescribed by the Secretary of the Treasury. 235.

WAR TAX.

ARTICLES SOLD IN FOREIGN COMMERCE. *See* TAXATION, 6.

WAR TRADE BOARD.

USE OF TRADE SECRETS. *See* TRADE SECRETS, 1, 2.

WAREHOUSE BONDS.

CANCELLATION. *See* CUSTOMS LAWS, 1, 2, 3, 4.

WATERCOURSES.

The owners of the "Tarbert" and "Receiver" sand and gravel bars in the bed of the Mississippi River are not entitled to compensation for the sand and gravel taken by the United States from these bars and used for the improvement of the navigation of the river by revetting its banks, so as to confine the waters of the river to its natural channel. 67.

WEST INDIA ISLANDS.

IMPORTATION OF DISTILLED SPIRITS. *See* LIQUORS, 19.

WHARF, GOVERNMENT.

SITKA, ALASKA, SALE OF UNDERLYING LAND. *See* PUBLIC LANDS, 3, 4.

WIDOWS OF SOLDIERS, SAILORS, AND MARINES. *See* CIVIL SERVICE, 6, 7, 8.

WINE. *See* LIQUORS, 9, 21.

WIRELESS TELEGRAPH. *See* RADIO APPARATUS.

WORDS AND PHRASES.

1. "Allowances."—Allowances under section 4757 of the Revised Statutes are "pensions" within the meaning of section 4813 of the Revised Statutes and the act of June 30, 1914 (38 Stat. 398), and should therefore be disposed of, in cases where the beneficiaries are inmates of the Naval Home, in the manner prescribed by that act. 268.

WORDS AND PHRASES—Continued.

2. **"Appointed or commissioned."**—The provisions of the act of August 29, 1916, requiring a particular kind of formal examination for those persons "appointed or commissioned" as officers in any rank in any class of the Naval Reserve Force, or "promoted" to a higher rank therein, when read in connection with the other provisions, clearly connote only permanent appointments to offices in the Naval Reserve Force. 175.
3. **"Beer."**—Whether the word "beer" as used in the provision of the act of November 21, 1918 (40 Stat. 1046), prohibiting the use of food products in the manufacturing of beer, includes ale, porter, stout, etc., depends upon whether these later beverages are ordinarily classed as beer. This is a question of fact and can not be determined as a matter of law. 498.
4. **"Commission."** See "Appointed and commissioned," *supra*.
5. **"Confirmation."**—"Confirmation" sets the seal of approval upon entrance into the Naval Reserve Force instead of "commission." Such temporary designations are known and sustained in the law as something entirely different in their nature from permanent appointments. 175.
6. **"Consent."**—"Consent" is equivalent to the cession of exclusive jurisdiction within the meaning of section 355, Revised Statutes. 261, 295.
7. **"Departments."** See "Executive Departments," *infra*.
8. **"Distilled Spirits."**—Wines, though fortified with distilled spirits, are not distilled spirits within the meaning of the food-control act and the war revenue act if they do not contain more than 24 per cent absolute alcohol by volume. 239.
9. **"Employee."**—Any person in the service of the Government not appointed by the President, a court, or the head of a department, and not elected, is an employee within the meaning of the Federal employees' compensation act. 202.
10. **Same.**—In its usual acceptance, the word "employee" is understood to apply to those, other than officers, in the service of the Government. 185.
11. **"Enrollment."**—The word "enrollment" is constantly used for entrance into the service of the Naval Reserve Force instead of "appointment." 175.
12. **"Executive Departments" and "Departments."**—It has been uniformly ruled by the Attorneys General that the terms "executive departments" and "departments," as ordinarily used in the acts of Congress, are terms of art, whose meaning is confined to offices and bureaus located at the seat of Government, together with the so-called field

WORDS AND PHRASES—Continued.

- forces, which, in theory, are only temporarily absent from Washington. 407.
13. "**Exportation.**"—The sending of goods out of this country merely for the purpose of destruction does not constitute an "exportation" within the intent of the drawback provision of the tariff act of October 3, 1913. 1.
 14. "**Fixed by Statute.**"—The wages of those employed under section 4 of the Panama Canal act are "fixed by statute" within the meaning of the relevant proviso to the sundry civil appropriation act of July 1, 1913. 331.
 15. "**Grade**" and "**Rank.**"—While "grade" has the same meaning as "office," "rank" is merely a classification to fix the position of officers with respect to other officers in the same or in other grades as to command, precedence, privilege, or pay. "Rank" may be conferred by mere notification, and without either examination, or commission. So also, while "grade" is only partially, "rank" is wholly within the control of Congress. 83.
 16. "**In Package Form.**"—Single hams and single sides of bacon wrapped or covered with paper, cloth, or gelatine are not "in package form" within the meaning of the net weight amendment to the food and drugs act. 150.
 17. "**Income.**"—The decision in *Towne v. Eisner* (245 U. S. 418) does not justify an administrative officer in setting aside and disregarding the present statute levying an income tax on stock dividends, since that decision does not in terms decide that Congress has not the power expressly to tax as income stock dividends of the character described in the present statute, although it did determine that the word "income" as used in the income-tax act of October 3, 1913, could not be taken to include stock dividends which had been declared from surplus profits earned prior to the taxing year and prior to the ratification of the sixteenth amendment to the Constitution. 215.
 18. "**Independent Governmental Establishments.**"—These are offices, bureaus, commissions, and branches of the Government service which are entirely independent of the executive departments. 408.
 19. "**Medal or Decoration.**"—The words "medal or decoration" appearing in the provision of the Army appropriation act of July 9, 1913 (40 Stat. 872), are used in their usual meaning and do not include such articles as bowls, cups, and photographs. 445.
 20. "**Military Forces.**"—The term "military forces" may be construed as referring to the Navy as well as the Army, within the meaning of the last three paragraphs of the

WORDS AND PHRASES—Continued.

act of July 9, 1918, which deal with the subject of medals and decorations. 447.

21. "**Military Service.**"—The term "military service" in the provision of the urgent deficiency act of February 25, 1919 (40 Stat. 1164), was used in its broad sense and applies to the entire Military Establishment, which includes the Navy and Marine Corps as well as the Army. 453.
22. "**Money Benefits.**"—The money benefits provided for in section 4756 of the Revised Statutes are "pensions" within the purview of section 4813 of the Revised Statutes and the pertinent provision of the act of June 30, 1914 (38 Stat. 398), and such money benefits inure to the grantees concurrently with maintenance in the Naval Home. 281.
23. "**Officer.**"—An officer in the United States Army is not by virtue of that fact alone an officer in the Department of War within the meaning of section 190 of the Revised Statutes. 474.
24. **Same.**—Officer of the United States as distinguished from an employee thereof, see "employees," *supra*.
25. "**Pensions.**"—The question propounded by the Secretary of the Interior as to whether the payments provided for under section 4756 of the Revised Statutes are within the purview of the term "pensions" as used in the act of June 30, 1914 (38 Stat. 398), pertains rather to the administration of the Navy Department than of the Department of the Interior, and as the Secretary of the Navy has not requested an opinion with respect to this question, the Attorney General is precluded by the settled rule of his department from expressing an opinion in regard to it. 131.
26. "**The Period of the War.**"—The signing of the armistice did not bring to an end "the period of the war" within the meaning of the war risk insurance act. 382.
27. "**Person, Firm, Corporation, or Association.**"—The words "person, firm, corporation, or association" in section 10 of the war finance corporation act of April 5, 1918, were used simply to describe by an inclusive phrase the possible parties to dealings with the War Finance Corporation. 335.
28. "**Promoted.**" See "Appointed or commissioned," *supra*.
29. "**Public Land.**"—The term "public land" has a well-defined meaning in the land laws of the United States. It means land that is open to public entry of some kind. 437.
30. "**Rank.**" See "Grade and rank," *supra*.
31. "**Refined Metal.**"—Antimonial lead, which is a combination of metals obtained from the smelting or refining process is a "refined metal" within the meaning of section 29 of the tariff act of July 24, 1897 (30 Stat. 210), and might be

WORDS AND PHRASES—Continued.

exported and cancellations or credits had upon the warehouse bond in the ratio of the respective metals contained in the imported ore or bullion. 18.

32. "Request or Demand."—The words "request or demand" as used in section 5 of the war minerals relief act of March 2, 1919, are synonymous with the word "ask." 496.

33. "Rural Post Roads."—The act of July 11, 1916 (39 Stat. 355), in section 2 defines rural post roads as follows: "That for the purpose of this act the term 'rural post road' shall be construed to mean any public road over which the United States mails are or may hereafter be transported." 109.

WORKMEN'S COMPENSATION ACT. See **FEDERAL EMPLOYEES' COMPENSATION ACT**, 3.

WORKMEN'S COMPENSATION, PENNSYLVANIA. See **TAXATION**, 4, 5.



